Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 49

September 2021

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 49

Update 49, September 2021

Intensive correction orders (ICOs) (alternative to full-time imprisonment) has been revised at **[3-630] ICO is a form of imprisonment** to add *Mandranis v R* [2021] NSWCCA 97, which reiterates that making an ICO requires the sentencing judge to follow a three-stage process before directing the sentence can be served in that way. The chapter has also been updated to add references to *Wany v DPP* [2020] NSWCA 318 and *Blanch v R* [2019] NSWCCA 304, confirming that an obligation to consider making an ICO may be enlivened where a cogent argument is advanced for taking that course. The commentary at **[3-632] Mandatory considerations when determining whether to impose ICO** has been substantially revised following *Mandranis v R* which considered the correctness of what has been described as the restrictive interpretation of s 66(2) *Crimes (Sentencing Procedure) Ac*t 1999 and whether a sentencing court must positively conclude an ICO is more likely, than full-time custody, to address an offender's risk of reoffending. *Mourtada v R* [2021] NSWCCA 211, where Basten JA made some observations concerning the controversy surrounding aspects of *R v Fangaloka* as it concerns s 66(2), has also been added. **[3-660] Pronouncement of ICO by court, terms and commencement** has been updated to add *Mandranis v R* and *R v Edelbi* [2021] NSWCCA 122. These state that the term of an ICO may be reduced to take account of pre-sentence custody as s 71 *Crimes (Sentencing Procedure) Act* requires an ICO to commence on the date it is made.

Guilty plea to be taken into account has been updated at **[11-515] Guilty plea discounts for offences dealt with on indictment** to add *Ke v R* [2021] NSWCCA 177 which considered the proper construction of s 25E(2)(a) *Crimes (Sentencing Procedure) Act*.

[12-500] Counting pre-sentence custody Reference to *Mandranis v R* and *R v Edelbi*, which endorse the approach of reducing an ICO to give effect to pre-sentence custody, has been added.

[17-410] Sentencing for historical child sexual offences replaces the previous **[17-410] Sentencing for offences committed many years earlier** in **Sexual offences against children**. The new commentary discusses the requirements of s 25AA *Crimes (Sentencing Procedure) Act* and the cases which have considered it.

Appeals at **[70-130] Crown appeals on sentence to the District Court** has been updated to include reference to *DK v Director of Public Prosecutions* [2021] NSWCA 134 which found that the prosecution, when it appeals a sentence, must establish error before the appeal can be upheld. **[70-080] Matters influencing decision of DPP to appeal** has been revised to refer to the recently revised and reissued NSW DPP Prosecution Guidelines and the references to the Cth DPP *Prosecution Policy of the Commonwealth: guidelines for the making of decisions in the prosecution process*) have also been updated.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 49

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Intensive correction orders (ICOs) (alternative to full-time imprisonment)

[3-600] Introduction

Section 7(1) *Crimes (Sentencing Procedure) Act* 1999 provides that a court that has sentenced an offender to imprisonment in respect of one or more offences may make an intensive correction order (ICO) directing that the sentence be served by way of intensive correction in the community.

Part 5 *Crimes (Sentencing Procedure) Act* sets out the sentencing procedures governing ICOs. The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017, which commenced on 24 September 2018, restructured and amended the provisions relating to ICOs.

The changes made allow offenders to access intensive supervision as an alternative to a short prison sentence and "help courts ensure that offenders address their offending behaviour and are held accountable": Attorney General (NSW), the Hon M Speakman SC, Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2.

A feature of Pt 5 is that community safety is the paramount consideration when determining whether to make an ICO because, the Attorney General said, at p 2, "community safety is not just about incarceration" and "community supervision and programs are far more effective" at reducing re-offending.

The provisions in Pt 5 also:

- give the court more discretion to tailor the particular conditions to be imposed on the ICO to the individual offender
- require that an ICO be subject to two standard conditions and at least one additional condition (which may include home detention)
- further restrict the offences for which an ICO can be made.

An ICO cannot be backdated: see **Pronouncement of ICO by court, terms and commencement** at **[3-660]**.

ICOs made before 24 September 2018 continue in operation but with revised conditions.

Home detention orders made before 24 September 2018 are taken to be ICOs subject to standard ICO conditions and a home detention condition. See **ICOs and home detention orders made before 24 September 2018** at **[3-690]**.

Summary of significant ICO provisions

- The court must not make an ICO unless it has obtained an assessment report in relation to the offender, but the court is not bound by that report: ss 17D, 69(2). However, the court is not required to obtain a report if satisfied it has sufficient information available to justify making the ICO without one: s 17D(1A). See **[3-635]**.
- An ICO must not be made for a single offence if the term of imprisonment exceeds 2 years. If an ICO is made for multiple offences, or two or more ICOs are made, the term of the aggregate or effective sentence of imprisonment must not exceed 3 years: s 68. See **[3-610]**, **[3-620]**.
- ICOs are not available for certain offences, including manslaughter, murder, prescribed sexual offences, certain terrorism offences, breaches of serious crime prevention and public safety orders, and offences involving the discharge of a firearm: s 67. See **[3-620]**.
- An ICO must not be made for offenders under the age of 18 years: s 7(3). See **[3-620]**.
- An ICO can only be made for a domestic violence offence where the court is satisfied the victim of the offence and any person with whom the offender is likely to reside, will be adequately protected: s 4B. See **[3-620]**.
- In determining whether to make an ICO, community safety is the paramount consideration. When considering community safety, the court is to assess whether an ICO or full-time detention is more likely to address the offender's risk of reoffending: s 66. See **[3-632]**.
- An ICO must commence on the date it is made but may be reduced to take account of pre-sentence custody. See **[3-660]**.
- When making an ICO, the court is required to impose the standard conditions and at least one additional condition (unless there are exceptional circumstances) and may impose further conditions where necessary: ss 73, 73A, 73B. Home detention is available as an additional condition of an ICO: s 73A(2). See **[3-640]**.
- The court must not make an ICO or impose a home detention or community service work condition unless it has obtained a relevant assessment report in relation to the offender: ss 73A(3), 17D(2), (4). See **[3-635]**, **[3-640]**.
- A court cannot request an assessment report for a home detention condition until it has imposed a sentence of imprisonment: s 17D(3). See **[3-635]**.
- The Parole Authority may, in certain circumstances, impose, vary or revoke any conditions of an ICO, including those imposed by the court: *Crimes (Administration of Sentences) Act* 1999, s 81A. See **[3-635]**, **[3-640]**.

[3-610] Power to make ICO subject to Pt 5

See also **[3-300] Penalties of imprisonment.**

A court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence be served by way of intensive correction in the community: s 7(1) *Crimes (Sentencing Procedure) Act* 1999. If such an order is made, the court must not set a non-parole period for the sentence: s 7(2).

Although s 7(1) is expressed in the past tense, "[a] court that has sentenced", s 7(4) makes it clear that the power under s 7(1) is "subject to the provisions of Part 5" of the Act. Part 5 is headed "Sentencing procedures for intensive correction orders" and applies when "a court is *considering*, or has made, an intensive correction order": s 64. [Emphasis added.] In *R v Fangaloka* [2019] NSWCCA 173 at [60], Basten JA concluded that there was no requirement to consider whether to direct that a sentence of imprisonment be served by way of ICO in *every* case that meets the requirements of Pt 5. McCallum JA agreed in *Wany v DPP* [2020] NSWCA 318 (Meagher JA and Simpson AJA agreeing) observing, at [51], that the text of s 64 supported that view. However, the obligation to *consider* making an ICO may be enlivened where a cogent argument is advanced for taking that course: *Wany v DPP* at [52].

[3-620] Restrictions on power to make ICO

Part 5, Division 2 *Crimes (Sentencing Procedure) Act* 1999 sets out specific restrictions on the power to make an ICO.

ICO not available for certain offences

Section 67(1) provides that an ICO must not be made in respect of a sentence of imprisonment for:

(a) murder or manslaughter

(b) a prescribed sexual offence

(c) a terrorism offence within the meaning of the *Crimes Act* 1914 (Cth) or under s 310J *Crimes Act* 1900

(d) an offence relating to a contravention of a serious crime prevention order under s 8 *Crimes (Serious Crime Prevention Orders) Act* 2016

(e) an offence relating to a contravention of a public safety order under s 87ZA *Law Enforcement (Powers and Responsibilities) Act* 2002

(f) an offence involving the discharge of a firearm

(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)–(f)

(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)–(g).

"Prescribed sexual offence" is defined in s 67(2) and encompasses a range of offences including offences under Pt 3, Divs 10–10A *Crimes Act* where the victim is under 16 years or the offence involves sexual intercourse and the victim is of any age; child prostitution; voyeurism offences where the victim is a child; State and Commonwealth child abuse material and child pornography offences; offences of trafficking children and procuring children for sexual activity under the Criminal Code (Cth) and some repealed offences under the *Crimes Act* 1914 (Cth).

Nor can an ICO be made with respect to an aggregate sentence of imprisonment in relation to two or more offences, where any one of the offences is an offence listed in s 67(1): s 67(3).

ICOs and domestic violence offences

An ICO must not be made in respect of a sentence of imprisonment for a domestic violence offence, or an aggregate sentence of imprisonment where any one or more of the offences is a domestic violence offence, unless the court is satisfied the victim of the domestic violence offence, and any person with whom the offender is likely to reside, will be adequately protected: s 4B(1). If the court finds a person guilty of a domestic violence offence, the court must not impose a home detention condition if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2).

ICOs not available for juvenile offenders

An ICO may not be made with respect to offenders under the age of 18 years: s 7(3).

ICOs not available where imprisonment exceeds limits

An ICO must not be made in respect of a single offence if the duration of the term of imprisonment for the offence exceeds 2 years: s 68(1). An ICO may be made in respect of an aggregate sentence of imprisonment, however the aggregate term must not exceed 3 years: s 68(2). Two or more ICOs may be made for two or more offences but the duration of any individual term of imprisonment must not exceed 2 years, and the duration of the term of imprisonment for all offences must not exceed 3 years: s 68(3); see *R v Fangaloka* [2019] NSWCCA 173 at [51].

A court cannot manipulate pre-sentence custody to bring a sentence within the jurisdictional ceiling for the imposition of an ICO: *R v West* [2014] NSWCCA 250.

ICOs not available for offenders residing in other jurisdictions

The court may not make an ICO in respect of an offender who resides, or intends to reside, in another State or Territory, unless the regulations declare that State or Territory to be an approved jurisdiction: s 69(3). No State or Territory is currently declared to be an approved jurisdiction.

[3-630] ICO is a form of imprisonment

An ICO is a "custodial sentence" referred to in Pt 2, Div 2 *Crimes (Sentencing Procedure) Act* 1999. Since it is a form of imprisonment, making an ICO requires a sentencing court to follow a three stage process before directing that the sentence can be served in that way: *R v Fangaloka* [2019] NSWCCA 173 at [44]; *Mandranis v R* [2021] NSWCCA 97 at [22]–[28].

First, the court must be satisfied that, having considered all possible alternatives, no penalty other than imprisonment is appropriate: s 5(1) *Crimes (Sentencing Procedure) Act*; *R v Douar* [2005] NSWCCA 455 at [70]; *R v Hamieh* [2010] NSWCCA 189 at [76].

Second, if a sentence of imprisonment is appropriate, the court determines the length of sentence without regard to how it is to be served: *R v Douar* at [71]; *R v Zamagias* [2002] NSWCCA 17 at [26]; *Zreika v R* [2012] NSWCCA 44 at [56]. It is preferable for the court to articulate its conclusion as to the appropriate term: *R v Assaad* [2009] NSWCCA 182 at [33]. It is inappropriate to consider how the sentence will be served before determining its length: *R v Ryan* [2006] NSWCCA 394 at [1], [4].

The court must then consider whether any alternative to full-time imprisonment should be imposed: *R v Zamagias* at [28]; *R v Foster* [2001] NSWCCA 215 at [30]; *Campbell v R* [2018] NSWCCA 87 at [47], [52]. The appropriateness of an alternative option depends on various factors, including whether such an alternative results in a sentence that reflects the objective seriousness of the offence and fulfils the purposes of punishment. Sight should not be lost of the fact that the more lenient the alternative the less likely it will do so: *R v Zamagias* at [28]; *R v Hamieh* at [76]; *R v Douar* at [72]. It is preferable to make clear that such alternatives have been considered and, if necessary, explain why they are not appropriate, although a failure to do so is not erroneous: *Casella v R* [2019] NSWCCA 201 at [63]–[65]; see also *Campbell v R* [2018] NSWCCA 87 at [53].

The third step of considering whether an alternative to full-time imprisonment should be imposed does not equate to an express obligation to consider whether it is appropriate that the sentence be served by way of an ICO. Neither s 7 nor Pt 5 of the Act should be construed as obliging the court to consider whether it is appropriate that a sentence of less than 2 years be served by way of an ICO: *R v Fangaloka* at [60]-[61]; *Karout v R* [2019] NSWCCA 253 at [89]–[90]. In *R v Fangaloka* at [60], Basten JA (Johnson and Price JJ agreeing) addressed the broader implications of such an approach observing that:

> If there were such an obligation, the Local Court (where the power to impose imprisonment for an individual offence is limited to 2 years) would be required to consider imposing a sentence by way of ICO in every case in which imprisonment was appropriate.

However, an obligation to *consider* making an ICO may be enlivened where a cogent argument is advanced for taking that course: *Wany v DPP* [2020] NSWCA 318 at [52]; *Blanch v R* [2019] NSWCCA 304 at [68]–[69].

Inherently lenient or a substantial punishment?

An ICO has the capacity to operate as substantial punishment, but can also reflect a significant degree of leniency because it does not involve immediate incarceration: *R v Pullen* [2018] NSWCCA 264 at [53]*; R v Pogson* [2012] NSWCCA 225 at [108]; *Whelan v R* [2012] NSWCCA 147 at [120]; see also *R v Fangaloka* at [67].

In *R v Pullen* the court concluded that ICO's under the new scheme still involved substantial punishment given the multiple mandatory obligations attached to the standard conditions (see *Crimes (Administration of Sentences) Regulation* 2014, cll 186, 187 and 189) and that the degree of punishment involved, and its appropriateness in a particular case, should be assessed having regard to the number and nature of conditions imposed. In some cases, an ICO could be more onerous because of the significant number of obligations prescribed by the regulations: *R v Pullen* at [66].

In *R v Fangaloka*, the court, when discussing the effect of the competing purposes of sentencing on the consideration of whether a sentence of imprisonment should be served in custody or by way of an ICO, observed at [67];

> there will remain cases in which the significant element of leniency contained in an ICO is inconsistent with the imposition of an adequate penalty, so that an ICO is an unacceptable form of imprisonment.

[3-632] Mandatory considerations when determining whether to impose ICO

Community safety must be the court's paramount consideration when determining whether to make an ICO: s 66(1) *Crimes (Sentencing Procedure) Act* 1999. Such consideration is mandatory, regardless of the weight it is ultimately given: *Wany v DPP* [2020] NSWCA 318 at [56], [60]; *R v Fangaloka* [2019] NSWCCA 173 at [65]. This does not require express reference to s 66, but it must be apparent, even if by implication, that consideration has been given to ss 66(1) and (2): *Blanch v R* [2019] NSWCCA 304 at [60]–[62]; *Mourtada v R* [2021] NSWCCA 211 at [37]; [43]. The obligation to consider s 66 only arises when the court is considering whether the sentence can be served by way of an ICO. If the proposed sentence exceeds 2 years, in the case of a sentence for an individual offence, or 3 years where an aggregate sentence is being contemplated, there is no requirement to consider s 66: s 68; *Cross v R* [2019] NSWCCA 280 at [26]; [35].

While community safety can operate in different ways in different circumstances, the purpose of s 66 is "merely to ensure that the court does not assume that full time detention is more likely to address a risk of reoffending than a community-based program of supervised activity": *R v Fangaloka* at [66]; *Mourtada v R* at [25].

When considering community safety, the court must assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending: s 66(2). This requirement recognises community safety is not achieved simply by incarcerating an offender, but that incarceration may have the opposite effect; the concept of community safety is linked with considerations of rehabilitation, which is more likely to occur with supervision and access to programs in the community: *R v Pullen* [2018] NSWCCA 264 at [84]. Consideration of specific deterrence also plays an important role in making the assessment required by s 66(2): *Mourtada v R* at [23]–[24]; [34].

Having reached a conclusion favouring an ICO under s 66(2), a sentencing court retains a discretion to refuse to make such an order. Of this, McCallum JA said, in *Wany v DPP*, at [64]:

> So much is made plain by s 66(3); and see the remarks of Basten JA in *Fangaloka* at [65]. But the point of the section is to require the sentencing court to consider that question without any preconception in favour of incarceration as the only path to rehabilitation.

Evidence to assist in determining an offender's risk of re-offending may be contained in an assessment report as the regulations require that this be addressed: cl 12A(1)(a) *Crimes (Sentencing Procedure) Regulation* 2017. However, subject to certain qualifications, not presently relevant, the court is not bound by the assessment report: s 69(2).

When deciding whether to make an ICO, the court must also consider the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act*, any relevant common law principles, and may consider any other matters thought relevant: s 66(3).

Whether s 3A and other considerations subordinate to community safety

There is controversy as to whether or not community safety, made the "paramount consideration" by s 66(1), has primacy over other relevant considerations, including the purposes of sentencing in s 3A.

In *R v Pullen* at [86] the court held that prioritising community safety this way necessarily meant other considerations, including those in s 3A, became subordinate. This was subsequently described in *Mandranis v R* [2021] NSWCCA 97 as the "inescapable consequence" of the clear language of s 66(1) — although only at the point of considering whether to make an ICO. The purposes of sentencing in s 3A will have already been taken into account when determining the length of the sentence: *Mandranis v R* at [50]–[51].

By contrast, the court in *R v Fangaloka* at [66] concluded it would be wrong to treat every consideration other than the means of addressing the risk of reoffending as subordinate. The obligation to consider the likelihood of a particular form of order addressing the offender's risk of re-offending, (found in s 66(2)) was said not to derogate from either the purposes of sentencing in s 3A or other relevant matters: at [65].

In *Karout v R* [2019] NSWCCA 253 at [88], Fullerton J (Hoeben CJ at CL agreeing) addressed the relationship between ss 3A and 66 as follows:

> … were the legislature to have intended to impose on sentencing courts an obligation to give paramount consideration to community supervised programs as a means of ensuring community safety as one of the purposes of sentencing in s 3A(c) of the *Sentencing Act*, or to impose on a sentencing courts a statutory obligation to give reasons for concluding that the other purposes of sentencing in s 3A, alone or in combination, dictate that even where the offender's risk of reoffending is such that community protection can be sufficiently addressed by an ICO, a sentence of full-time custody is the appropriate sentencing outcome, I would have expected the Legislature would have made that plain when the 2018 amending Act was passed.

Controversy concerning a restrictive interpretation of s 66(2)

Cases since *R v Fangaloka* have expressed concern about what was described by Basten JA (Johnson and Price JJ agreeing) in *R v Fangaloka* at [63] as "an alternative reading of s 66" which was "restrictive rather than facilitative". His Honour said:

> Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. *That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight*. [Emphasis added.]

In *Casella v R* [2019] NSWCCA 20 at [108], Beech-Jones J (Bathurst CJ and N Adams J agreeing) expressed "significant doubts" about the correctness of the emphasised statement, observing "[n]othing in s 66 purports to operate as a prohibition to that effect": see also *Wany v DPP* at [62] (McCallum JA; Simpson AJA agreeing, Meagher JA not deciding) and *Mandranis v R* at [49] (Simpson AJA; Garling and N Adams JJ agreeing) which support this proposition.

Arguably, however, the impugned comments in *R v Fangaloka* do not represent Basten JA's concluded view on this issue as his Honour went on to state at [65]:

> *The better view* is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general

> purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration. [Emphasis added].

In *Mourtada v R* [2021] NSWCCA 211, Basten JA, after acknowledging the controversy resulting from his observations at [63] of *R v Fangaloka*, went on to say:

> No doubt the judgment could have been more clearly expressed, but the view accepted at [65]-[66] did *not* include the proposition that a positive favourable opinion was required before an ICO should be imposed. Rather, a more nuanced approach was adopted to the weighing of the various considerations required to be taken into account under s 66. At [66] the reasoning noted that the purpose of s 66 was "to ensure that the court does not assume that full-time detention is more likely to address a risk of reoffending than a community-based program of supervised activity." The sentencing court was not required to favour an ICO over full-time custody but it was required to have specific regard to community protection and to bear in mind that short sentences were not necessarily effective as a means of deterring further offending.

An application for special leave to appeal against the "restrictive" interpretation of s 66 was refused by the High Court on the basis it had no prospect of success: *Fangaloka v The Queen* [2020] HCASL 12.

[3-634] ICOs available for sentences of 6 months or less

Nothing in s 5(2) or Pt 5 of the *Crimes (Sentencing Procedure) Act* 1999 precludes imposing an ICO for a sentence of 6 months or less: *Casella v R* [2019] NSWCCA 201 at [105]; [110]. In *Casella v R*, the applicant's appeal was allowed and he was re-sentenced to 6 months imprisonment which the court directed was to be served by way of an ICO. Beech-Jones J, with whom Bathurst CJ and N Adams J agreed, concluded that the statement in *R v Fangaloka* at [56] that "in practice, Pt 5 is unlikely to be applied to very short sentences (for 6 months or a lesser period)" should not be regarded as having any binding effect on either the CCA or lower courts as this issue was not essential to the outcome in that case: at [105].

[3-635] ICO assessment reports

In deciding whether or not to make an ICO, the court is to have regard to the contents of an assessment report and such evidence from a community corrections officer as the court considers necessary: s 69(1) *Crimes (Sentencing Procedure) Act* 1999.

The relevant statutory requirements for assessment reports are contained Pt 2, Div 4B (ss 17B–17D) *Crimes (Sentencing Procedure) Act*.

An assessment report may be requested:

- after an offender has been found guilty and before imposing sentence: s 17C(1)(b)(i)
- during sentencing proceedings after a sentence of imprisonment has been imposed: s 17C(1)(b)(ii)
- during proceedings to correct a sentencing error: s 17C(1)(b)(iv).

If a sentence of imprisonment has been imposed and the court then requests an assessment report for the purpose of considering whether the sentence should be served by way of an ICO, the referral acts as a stay on the sentence and the offender should either be remanded in custody or granted bail: s 17C(2). If the offender subsequently fails to appear, the court may issue a warrant: *Bail Act* 2013, s 77A.

A court must not:

- make an ICO unless it has obtained a relevant assessment report in relation to the offender (although it is not required to obtain an assessment report if satisfied there is sufficient information before it to justify making the ICO): s 17D(1), s 17D(1A)
- impose a home detention or community service work condition on an ICO unless it has obtained an assessment report relating to the imposition of such a condition: s 17D(2), 17D(4)
- request an assessment report concerning the imposition of a home detention condition unless it has imposed a sentence of imprisonment on the offender for a specified term: s 17D(3).

It is important to comply with the mandatory requirements of s 17D(4) as that will enable proper consideration of the appropriate sentence: *RC v R; R v RC* [2020] NSWCCA 76 at [223]–[228]. The court is not bound by the assessment report except in the circumstances identified in s 73A(3): s 69(2). Section 73A(3) provides that a court must not impose a home detention condition or community service work condition on an ICO unless an assessment report states the offender is suitable.

A court may form the view that an ICO is not appropriate where a report indicates the offender will be unable to comply with the conditions of an ICO or if he or she is likely to breach the conditions: *R v Zreika* [2012] NSWCCA 44 at [67].

For the matters the assessment report must address, see **Requirements for assessment reports** at **[3-510]**.

[3-640] ICO conditions

ICO conditions are imposed by the court under Pt 5, Div 4 *Crimes (Sentencing Procedure) Act* 1999, and may be imposed, varied or revoked by the Parole Authority or, in some circumstances, Community Corrections: *Crimes (Administration of Sentences) Act* 1999, ss 81, 81A, 164.

An ICO is subject to:

- standard conditions (s 72(3) *Crimes (Sentencing Procedure) Act*)
- additional conditions (s 73A)
- any further conditions imposed by the court (s 73B)
- any conditions imposed by the Parole Authority under ss 81A or 164 *Crimes (Administration of Sentences) Act* 1999.

The court must, at the time of sentence, impose on the ICO the standard conditions, at least one additional condition and may impose further conditions: s 73.

Range of conditions

Standard conditions

The court must, at the time of sentence, impose on an ICO the standard ICO conditions, which are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(1), 73(2).

Additional conditions

In addition to the standard conditions, the court must, at the time of sentence, impose at least one of the additional conditions referred to in s 73A(2), unless satisfied there are exceptional circumstances: s 73A(1A). In *Casella v R* [2019] NSWCCA 201, the fact that the applicant had been on conditional bail while his appeal was pending was found to be an exceptional circumstance for the purposes of s 73A: at [100]. The additional conditions available include:

(a) home detention

(b) electronic monitoring

(c) a curfew

(d) community service work requiring the performance of community service work for a specified number of hours

(e) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment

(f) abstention from alcohol or drugs or both

(g) a non-association condition prohibiting association with particular persons

(h) a place restriction condition prohibiting the frequenting of or visits to a particular place or area.

If the court determines not to impose an additional condition, it must record its reasons for doing so, however, the failure to record reasons does not invalidate the sentence: s 73A(1B).

The court must not impose a home detention or community service work condition on an ICO unless an assessment report states the offender is suitable to be the subject of such a condition: s 73A(3). The court may limit the period during which an additional condition is in force: s 73A(4).

Maximum hours and minimum periods for community service work

The maximum number of hours that may be specified for community service work in an additional condition of an ICO are set out in cl 14(1) *Crimes (Sentencing Procedure) Regulation* 2017:

(a) 100 hours for offences with a maximum term of imprisonment of 6 months or less

(b) 200 hours for offences with a maximum term of imprisonment exceeding 6 months but not 1 year

(c) 750 hours for offences with a maximum term of imprisonment exceeding 1 year.

The minimum period that a community service work condition of an ICO must be in force is set out in cl 14(2):

(a) 6 months if the hours of work do not exceed 100 hours

(b) 12 months if the hours of work exceed 100 hours but not 300 hours

(c) 18 months if the hours of work exceed 300 hours but not 500 hours

(d) 2 years if the hours of work exceed 500 hours.

Further conditions

The court may impose further conditions on an ICO but these must not be inconsistent with any standard or additional conditions (whether or not they are imposed on the particular ICO): s 73B.

Offenders' obligations under ICO conditions

The obligations of offenders subject to the standard ICO conditions are set out in cll 186, 187 *Crimes (Administration of Sentences) Regulation* 2014: s 82 *Crimes (Administration of Sentences) Act*. Their specific obligations with respect to home detention, electronic monitoring, curfew, community service work, rehabilitation or treatment, abstention, non-association, and place restriction conditions are set out in cll 189–189G.

Power of Parole Authority and Community Corrections to vary conditions

The Parole Authority may, on application of a community corrections officer or the offender, impose, vary or revoke any conditions of an ICO, including those imposed by the sentencing court: s 81A(1) *Crimes (Administration of Sentences) Act*. However, the Parole Authority must not vary or revoke a standard condition, or impose or vary any other condition unless the sentencing court could have imposed or varied the condition under Pt 5 *Crimes (Sentencing Procedure) Act*: s 81A(2). If the Parole Authority revokes an additional condition on an ICO, it must replace it with another additional condition, unless there is already another additional condition in force with respect to the order, or unless there are exceptional circumstances: s 81A(3)–(4).

The Parole Authority must not impose a period of home detention or a condition requiring community service work unless a report from a community corrections officer states that imposing such a condition is appropriate: s 81A(2)(d).

A condition of an ICO relating to supervision, curfew, non-association and place restriction (ss 73(2)(b), 73A(2) *Crimes (Sentencing Procedure) Act*) may be suspended by a community corrections officer: s 82A. The factors to be taken into account before suspending a supervision condition are found in cl 189I *Crimes (Administration of Sentences) Regulation* 2014.

An ICO expires at the end of the sentence to which it relates unless it is sooner revoked: s 83.

Care must be exercised in the administration of the conditions. The capacity to direct the offender must be confined to a legitimate purpose in furtherance of the specific court order: *R v Pogson* [2012] NSWCCA 225 at [101]. For example, requiring an offender to submit to breath testing where the offender is not subject to a court-ordered condition prohibiting the use of alcohol may be beyond power: *R v Pogson* at [101].

[3-650] Multiple orders

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). "Relevant order" is defined as an ICO, CCO or CRO: s 17E. If an offender is subject to multiple orders at the same time, an ICO (and its conditions) prevails over a CCO (and its conditions) and a CCO (and its conditions) prevails over a CRO (and its conditions): s 17F(3),(4). Despite this, a standard condition prevails over a condition that is not standard: s 17F(4)(c). For community service work and curfew conditions under multiple orders, see **Multiple orders** at **[3-520]**.

[3-660] Pronouncement of ICO by court, terms and commencement

The form of order is that the court pronounces the offender is sentenced to a term of imprisonment for a particular duration and then directs that it be served by way of an ICO. The court must not set a non-parole period: s 7(2). At the time of sentence, the court must impose on the ICO the standard conditions, additional conditions and any further conditions: s 73.

The Local Court cannot make an ICO in the offender's absence: s 25(1)(b) *Crimes (Sentencing Procedure) Act* 1999.

The term of an ICO is the same as the term of imprisonment in respect of which the order is made: s 70; s 83 *Crimes (Administration of Sentences) Act* 1999.

An ICO must commence on the date it is made (unless it is made in relation to a sentence of imprisonment that is to be served consecutively, or partly consecutively, with another sentence of imprisonment the subject of an ICO): s 71. It cannot be backdated: *Mandranis v R* [2021] NSWCCA 97 at [55]–[56]; *R v Edelbi* [2021] NSWCCA 122 at [79]–[80]. The term of the ICO may be reduced for pre-sentence custody to enable the ICO to commence on the day that sentence is imposed: *Mandranis v R* at [61]; see also **[12-500] Counting pre-sentence custody**.

An offender may not be subject to two or more ICOs to be served concurrently or consecutively (or partly concurrently and partly consecutively) where the date at which the new sentence will end is more than 2 years after the date on which it was imposed: s 68(1).

Explaining the order

The court must ensure that all reasonable steps are taken to explain to the offender the ICO obligations and the consequences of a failure to comply: s 17I(1).

A court must cause written notice of the order to be given to the offender and to Corrective Services as soon as practicable after making an ICO: s 17J(1).

[3-670] Breaches of ICOs

Where the Commissioner of Corrective Services or a community corrections officer is satisfied an offender has failed to comply with his or her obligations under an ICO, a community corrections officer may, pursuant to s 163(2) *Crimes (Administration of Sentences) Act* 1999:

- record the breach and take no formal action
- give an informal warning to the offender

- give a formal warning that further breaches will result in referral to the Parole Authority
- give a direction about the non-compliant behaviour
- impose a curfew.

If the breach is more serious, the Commissioner or a community corrections officer can refer the breaches to the Parole Authority: s 163(3). In that case, where the Parole Authority is satisfied an offender has failed to comply with his or her obligations under an ICO (s 164(1)), it may, pursuant to s 164(2):

- record the breach and take no further action
- give a formal warning
- impose any conditions on the ICO
- vary or revoke the conditions of the ICO, including those imposed by the court
- revoke the ICO.

Section 164(6) prescribes certain restrictions on the power of the Parole Authority to vary, revoke or impose conditions following the breach of an ICO. They are the same as those applying where the Parole Authority varies, revokes or imposes conditions generally (without a breach) under s 81A: see **ICO conditions** at **[3-640]**.

Where an ICO is revoked, a warrant is issued for the offender's arrest and the sentence ceases to run. A revocation order takes effect on the date on which it is made or on such earlier date as the Parole Authority thinks fit: s 164A(1). The earliest date on which the revocation order may take effect is the first occasion on which it appears to the Parole Authority that the offender failed to comply with his or her obligations under the order: s 164A(2). If an offender is not taken into custody until after the day on which the revocation order takes effect, the term of the offender's sentence is extended by the number of days the person was at large after the order took effect: s 164A(3).

[3-680] Federal offences

Sentencing alternatives under State or Territory law are available to federal offenders if prescribed under s 20AB *Crimes Act* 1914 (Cth) and/or reg 6 *Crimes Regulations* 1990 (Cth). The *Crimes Amendment Regulations* 2010 (No 4) (Cth) amended reg 6 *Crimes Regulation* 1990 (Cth) to enable an ICO to be imposed for a Commonwealth offence.

Section 20AB provides, inter alia, "such a sentence or order may in *corresponding cases* be passed or made" [emphasis added]. The question that arises is the extent to which the phrase "corresponding cases" in s 20AB can be read to refer to equivalent State offences.

Neither reg 6 C*rimes Regulation* nor s 20AB exclude specific offences from an ICO. However, s 67(1) *Crimes Sentencing Procedure Act* 1999 (NSW) purports to exclude a number of Commonwealth offences from an ICO: see **Restrictions on power to make ICO** at **[3-620]**.

Section 20AC *Crimes Act* 1914 addresses the circumstance where a Commonwealth offender has failed to comply with an ICO, made under s 20AB(1).

[3-690] ICOs and home detention orders made before 24 September 2018

Existing ICOs

Existing ICOs made under s 7 *Crimes (Sentencing Procedure) Act* 1999 before 24 September 2018 are taken to be an ICO subject to:

- the standard ICO conditions
- any conditions imposed under s 81(3) *Crimes (Administration of Sentences) Act* 1999 and in force immediately before 24 September 2018
- a condition requiring the offender to undertake a minimum of 32 hours of community service work a month as directed by a community corrections officer; and
- any other conditions prescribed by the regulations: Sch 2, Pt 29, cl 72.

The conditions imposed on the ICO by the court under s 81 *Crimes (Administration of Sentences) Act* 1999 as in force before 24 September 2018 cease to apply to the order: Sch 2, Pt 29, cl 72(5).

An offender who is subject to a condition requiring 32 hours of community service work a month is subject to the same obligations as prescribed for the purposes of s 82 *Crimes (Administration of Sentence) Act* for an offender who is subject to a community service work condition of an ICO: Sch 2, Pt 29, cl 72(3A).

Sections 163 and 164 *Crimes (Administration of Sentences) Act* (the breach provisions) as in force from 24 September 2018 apply to an ICO in respect of action that may be taken for a breach of the order: Sch 2, Pt 29, cl 72(4).

Existing home detention orders

An existing home detention order made under s 6 before 24 September 2018 is taken to be an ICO subject to the following:

- the standard ICO conditions
- a home detention condition
- any conditions imposed under s 103(1)(b) or (c) *Crimes (Administration of Sentences) Act* in force immediately before 24 September 2018
- any other conditions prescribed by the regulations: Sch 2, Pt 29, cl 71.

The ICO operates for the same term as the home detention order: Sch 2, Pt 29, cl 71(5). A parole order made in relation to the home detention order ceases to have effect from 24 September 2018 and any period during which the offender would have been subject to a parole order is to be served subject to the standard conditions of the ICO only: Sch 2, Pt 29, cl 71(6), (7).

If an assessment report was prepared for an offender for the purposes of former s 78 (suitability for home detention) or s 86 (suitability for community service work) before their repeal, the report is taken to be an assessment report for the purposes of s 17D(2) and (4) and a further report is not required: Sch 2, Pt 29, cl 82A(1), (2).

Appeals in respect of converted orders

An appeal with respect to an ICO made before 24 September 2018 is not affected by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017 unless

Guilty plea to be taken into account

[11-500] Introduction

Until the introduction of Pt 3, Div 1A *Crimes (Sentencing Procedure) Act* 1999 on 30 April 2018, the common law recognised that sentencing judges had a broad discretion to discount a sentence for the utilitarian value of a plea of guilty.

In *Siganto v The Queen* (1998) 194 CLR 656 at [22], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

A "sentencing discount" is a reduction in the otherwise appropriate sentence by a quantifiable amount due to a specific policy consideration — in the case of a guilty plea — a utilitarian benefit: *R v Borkowski* [2009] NSWCCA 102. It is applied after the otherwise appropriate sentence has been determined: at [32].

However, in the Second Reading Speech to the Justice Legislation Amendment (Committals and Guilty Pleas) Bill, the Attorney General said Pt 3, Div 1A was being introduced to replace "the existing common law discount for the utilitarian value of a guilty plea": NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 October 2017, p 9.

[11-503] Impermissible to penalise offender for pleading not guilty

A court is not permitted to penalise an offender for pleading not guilty. In *Siganto v The Queen* at [22] it was said:

> A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.

The court judges an offender for the crime, not for the defence: at [21], affirming the proposition expressed in DA Thomas, *Principles of Sentencing* (2nd Ed), 1979, Heinemann, London, p 50. See also *Cameron v The Queen* (2002) 209 CLR 339. The High Court in *Siganto v The Queen* at [21] also affirmed the following passage from *R v Gray* [1977] VR 225 at 231:

> It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence.

[11-504] Obligations of the court taking the plea

Where both parties to proceedings are present, s 192(2) *Criminal Procedure Act* 1986 provides that the court must "state the substance of the offence" to an accused and ask if the accused "pleads guilty or not guilty". The stating by the court of the substance of the offence is not of itself a condition precedent to the validity of a plea of guilty, and it is not the purpose of ss 192 and 193 that the power to convict is not enlivened unless this has occurred: *Collier v Director of Public Prosecutions* [2011] NSWCA 202 at [59].

The purpose of s 192(2) is to ensure that, to the knowledge of the court, an accused adequately understands the charge they are pleading to: at [53]. Generally in the case of an unrepresented accused, to ensure they understand the charges and unequivocally plead to those charges, it is necessary that the court state the substance of each offence to the accused and take separate pleas for each: at [59]. On the other hand, an "accused person" is defined to include "a legal practitioner representing an accused person": s 3. Where an accused is legally represented, the practitioner can enter a plea.

The court should, as a matter of practice, at least draw the legal representative's attention to the Court Attendance Notice/s (CAN) and the offences stated in them. This would amount to substantial, if not exact, compliance with s 192(2): at [55], [59]. In a busy Local Court it may be highly inconvenient to individually state multiple charges suggesting that it was not the purpose of s 192(2) to invalidate pleas or convictions if that section is not complied with: at [55].

Section 193(1) *Criminal Procedure Act* provides that the court must convict the accused or make the order accordingly *if* "the accused person pleads guilty, and does not show sufficient cause why he or she should not be convicted or not have an order made against him or her".

[11-505] Setting aside a guilty plea

Section 207 *Criminal Procedure Act* 1986 makes provision for the setting aside of a conviction after the withdrawal of a plea of guilty. It provides:

> (1) An accused person may, at any time after conviction or an order has been made against the accused person and before the summary proceedings are finally disposed of, apply to the court to change the accused person's plea from guilty to not guilty and to have the conviction or order set aside.
>
> (2) The court may set aside the conviction or order made against the accused person and proceed to determine the matter on the basis of the plea of not guilty.

An accused seeking to withdraw a guilty plea must demonstrate a miscarriage of justice has occurred: *R v Boag* (unrep, 1/6/94, NSWCCA). The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered: *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA); *R v Van* [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163] extensively reviews the case law.

Johnson J in *R v Wilkinson (No 4)* [2009] NSWSC 323 at [41]–[48] summarised the principles in appellate decisions governing an application to withdraw a plea of guilty [case references and citations omitted]:

> [41] There is a well-recognised discretion to allow a person leave to withdraw a plea of guilty, at least prior to conviction.
>
> [42] The Court may, in the exercise of discretion, grant leave to a person to withdraw a plea of guilty at any time before sentence is passed … Each case must be looked at in regard to its own facts and a decision made whether justice requires that such a course be taken.
>
> [43] The onus lies upon the Applicant to demonstrate that leave should be granted … The Applicant must establish a good and substantial reason for the Court taking the course of granting leave to withdraw the plea … An application to withdraw a plea of guilty is to be approached with caution bordering on circumspection.

> [44] The plea of guilty itself is a cogent admission of the ingredients of the offence … Indeed, it has been described as the most cogent admission of guilt that can be made.
>
> [45] On an application for leave to withdraw a plea of guilty, the question is not guilt or innocence as such but the integrity of the plea of guilty.
>
> [46] A person may plead guilty upon grounds which extend beyond that person's belief in his guilt, and the entry of a plea of guilty upon such grounds nevertheless constitutes an admission of all the elements of the offence, and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred, and this will normally only arise where the accused person did not understand the nature of the charge, or did not intend by his plea to admit his guilt of it … Although these principles were expressed in the context of an appeal, the same principles apply where application is made at first instance for leave to withdraw a plea of guilty.
>
> [47] Where an application is made for leave to withdraw a plea of guilty, evidence ought be adduced from the accused person as to the circumstances in which he or she came to plead guilty.
>
> [48] The various circumstances identified by Spigelman CJ in *R v Hura* (2001) 121 A Crim R 472 at 478 [32] provide assistance where application is made for leave to withdraw a plea of guilty. These are:
>
> 1. Where the Appellant "did not appreciate the nature of the charge to which the plea was entered".
> 2. Where the plea was not "a free and voluntary confession".
> 3. The "plea was not really attributable to a genuine consciousness of guilt".
> 4. Where there was "mistake or other circumstances affecting the integrity of the plea as an admission of guilt".
> 5. Where the "plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt".
> 6. The "plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt".
> 7. If "the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt".

An application to withdraw a plea of guilty in the Local Court cannot be treated on appeal as an application for an annulment of a conviction and the District Court will fall into jurisdictional error by doing so: *DPP v Arab* [2009] NSWCA 75 at [39].

[11-510] Summary of the two guilty plea discount schemes

There are two distinct guilty plea discount schemes provided for in the *Crimes (Sentencing Procedure) Act* 1999:

1. A mandatory sentencing discount scheme is contained in Pt 3, Div 1A and applies to an offence dealt with on indictment, whenever it was committed, provided the proceedings commenced on or after 30 April 2018: see [11-515].
2. Section 22 concerns offences dealt with summarily and indictable offences where the proceedings commenced before 30 April 2018: see [11-520] and [11-525].

A guilty plea is a factor to be taken into account in mitigation of a sentence under s 21A(3)(k) of the Act. An offer to plead guilty to a different offence, where the offer

is not accepted and the offender is subsequently found guilty of that offence, or a reasonably equivalent offence, is a mitigating factor under s 21A(3)(n). See **Section 21A — aggravating and mitigating factors** at [11-000].

[11-515] Guilty plea discounts for offences dealt with on indictment

Part 3, Div 1A of the *Crimes (Sentencing Procedure) Act* 1999 provides for a scheme of fixed sentencing discounts for the utilitarian value of a guilty plea for offences dealt with on indictment (whenever committed) provided the proceedings commenced on or after 30 April 2018: Sch 2, Pt 30.

This scheme replaces the common law discount for the utilitarian value of a guilty plea (see **Introduction** at [11-500]. The provisions limit the discretion of a sentencing judge with respect to the quantum of the discount for a guilty plea after an offender has been committed for trial. A maximum discount of 25% is now only available if the plea was entered in the Local Court.

The new scheme does not apply to:

- Commonwealth offences: s 25A(1)(a)
- offences committed by persons under 18 years at the time of the offence if they were under 21 years when the relevant proceedings commenced: s 25A(1)(b)
- a sentence of life imprisonment: s 25F(9)
- offences dealt with summarily or an offence dealt with on indictment to which Pt 3, Div 1A does not apply: s 22(5).

An offender bears the onus of proving, on the balance of probabilities, that there are grounds for the sentencing discount: s 25F(5).

The court must indicate how the sentence imposed was calculated where a discount is applied, or give reasons for reducing or refusing to apply the discount: s 25F(7). Failure to comply with Pt 3, Div 1A does not invalidate the sentence: s 25F(8).

Mandatory discounts

Section 25D(2) *Crimes (Sentencing Procedure) Act* prescribes the following mandatory discounts for the utilitarian value of a guilty plea:

- 25%, if a guilty plea was accepted in committal proceedings: s 25D(2)(a)
- 10%, if the offender pleaded guilty at least 14 days before "the first day of trial of an offender" (defined in s 25C(1)), or at the first available opportunity after complying with the pre-trial notice requirements: s 25D(2)(b)
- 5%, in any other case: s 25D(2)(c).

The mandatory discount scheme also applies to an offence the subject of an ex officio indictment or a count for a new offence added to an existing indictment where the offender pleads guilty as soon as practicable after the ex officio indictment is filed or the indictment is amended to include the new count: s 25D(3). However, the offender is not entitled to the 25% discount if:

- the elements of the new offence are substantially the same as those of the offence in the original indictment (and the penalty is the same or less), or
- the offender previously refused an offer to plead guilty to the new offence made by the prosecutor which was recorded in a negotiations document: s 25D(4).

The legislative intention behind s 25D(4) can be construed as foreclosing the availability of large sentencing discounts when there are earlier opportunities for both parties to offer and negotiate a guilty plea. It would otherwise be inimical to the principle objective of the early appropriate guilty plea scheme to allow for the maximum discount to be available during sentence proceedings: *R v Doudar* [2020] NSWSC 1262 at [63]. "Substantially the same" in s 25D(4)(a) should be given its natural and ordinary meaning: at [64]. In *R v Doudar* the sentencing judge rejected a submission that a 25% discount should be given and concluded a 10% discount for a guilty plea to accessory after the fact for murder was appropriate, because that offence occurred within substantially the same factual and evidentiary matrix as the original murder charge for which the offender had been committed for trial: [63], [65], [67].

The new scheme also applies to an offender who pleads guilty after being found fit to be tried and whose matter was not remitted to a magistrate for further committal proceedings: s 25D(5). A 25% discount is only available if the offender pleads guilty as soon as practicable after being found fit: s 25D(5)(a).

Discounts when plea offer to different offences refused when made

The mandatory discount scheme also applies if an offender's offer to plead guilty to a different offence was recorded in a negotiations document and was for an offence not the subject of the proceedings and was not accepted by the prosecutor:

- and the offender was subsequently found guilty of the different offence or a reasonably equivalent offence (s 25E(1)), or
- was accepted by the prosecutor after committal and the offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender (s 25E(2)).

A "negotiations document" is defined in s 25B to include a case conference certificate. In *Ke v R* [2021] NSWCCA 177, the court concluded it was unfair that the applicant's sentence was discounted by 10%, and not 25%, following her guilty plea in the District Court to an offence of dealing with the proceeds of crime being reckless to that fact (*Crimes Act* 1900, s 193B(3)). She had offered to plead guilty to that offence before being committed for trial but it had been rejected. Nor was it recorded in the case conference certificate filed on committal as required by s 75 *Criminal Procedure Act* 1986. Bellew J (Adamson J agreeing; see also Brereton JA at [63] to similar effect) held that the phrase "an offer recorded in a negotiations document" in s 25E(2)(a) should be construed as meaning "an offer which was recorded *or which was required to be recorded* in a negotiations document" (emphasis added). His Honour said, at [338], that accepting any other interpretation would:

> …bring about a result which … could not possibly have been intended by the Parliament when enacting the scheme. Specifically … it could not possibly have been the Parliament's intention, in enacting s 25E, to bring about a result whereby an offender was deprived of the benefit of a significant discount on [their] sentence as the result of both parties to the proceedings simply overlooking a requirement to record the undisputed fact of a previous offer to plead guilty. That is particularly so in circumstances where the clear intention of the Parliament, reflected in s 75(1)(b), was that any offer to plead guilty to (inter alia) a different offence be recorded in the case conference certificate.

Not allowing or reducing the discount

Despite the mandatory terms of s 25D(1), s 25F provides that the court can refuse to give a discount or a reduced discount if:

- the offender's culpability is so extreme the community interest in retribution, punishment, community protection and deterrence warrants no, or a reduced, discount: s 25F(2), or
- the utilitarian value of the plea was eroded by a factual dispute which was not determined in the offender's favour: s 25F(4).

If a case conference certificate was filed, the prosecutor cannot submit that no discount should be given unless the defence was notified of the prosecution's intention to do so either at or before the conference: s 25F(3).

[11-520] Guilty plea discounts for offences dealt with summarily and exceptions to Pt 3 Div 1A

Part 3, Div 1A *Crimes (Sentencing Procedure Act* 1999 limits the operation of s 22 to offences dealt with summarily and "to a sentence for an offence dealt with on indictment to which Div 1A does not apply": s 22(5). Section 22(1) provides that a court may impose a lesser penalty after considering the following:

(a) the fact of the guilty plea,

(b) the timing of the plea or indication of intention to plead, and

(c) the circumstances in which the offender indicated an intention to plead guilty.

Section 22(1A) provides that the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence. It reflects the common law on the subject.

The "circumstances" a court can take into account for the purposes of s 22(1)(c) can include those beyond the offender's control such as number and type of charges, the fitness of the offender to plead, offers to plead which are initially rejected but later accepted, or where the prosecution adds to the charges and indicates it will amend the charge at a later time to specify a more appropriate offence.

Guideline for guilty plea discount

In *R v Thomson and Houlton* (2000) 49 NSWLR 383 Spigelman CJ (Wood CJ at CL, Foster AJA, Grove and James JJ agreeing) set out the following guideline at [160]:

(i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.

(ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.

(iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25 per cent discount on sentence. The primary

consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

[*Note*: The top of the range would be expected to be restricted to pleas at the earliest possible opportunity and should not be given, save in an exceptional case, after a matter has been set down for trial. A discount towards the bottom of the range is appropriate for late pleas, for example, those entered on the date fixed for trial, unless there are particular benefits arising from the prospective length and complexity of the trial: at [155]. The complexity of the issues about which evidence will have to be gathered and adduced will affect the value of the plea. The greater the difficulty of assembling the relevant evidence and the greater the length and complexity of the trial, the greater the utilitarian value of a plea: at [154]. Rare cases involving exceptional complexity and trial duration may justify a higher discount: at [156]. A discount within the range specified will not mean that a trial judge's exercise of discretion cannot be subject to appellate review: at [158].]

(iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

[*Note*: There are circumstances in which the protection of the public requires a long sentence to be imposed such that no discount for the plea is appropriate: at [157].]

The range of discount referred to in *R v Thomson and Houlton* is a guideline only. In a given situation it creates no presumption or entitlement to a particular discount: *R v Scott* [2003] NSWCCA 286 at [28]; *R v Newman* [2004] NSWCCA 113 at [12] and *R v Araya* [2005] NSWCCA 283 at [44].

The R v Borkowski principles

In *R v Borkowski* [2009] NSWCCA 102, Howie J (McClellan CJ at CL and Simpson J agreeing) at [32] summarised the following "principles of general application" when a sentence is discounted for a guilty plea:

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186 [Principle 5 no longer applies: see below].
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.

7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic* [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* (*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The trial judge erred in *R v Borkowski* by giving the offender a 25% utilitarian discount for a guilty plea taken at first arraignment when the discount should not have been more than 15%.

Bathurst CJ in *R v AB* [2011] NSWCCA 229 at [3], said courts should "... generally continue to follow the approach in *R v Borkowski* … the principles have to be applied by reference to the particular circumstances in any case".

The discount for a plea is not fixed and may be eroded as a result of the manner in which the sentence proceedings are conducted: per Johnson J at [33]; Bathurst CJ at [2] agreeing. AB was given a "generous" (at [24]) 25% discount for a guilty plea entered in the Local Court following a significant dispute on sentence which was resolved against him.

The position in relation to principle 5 in *R v Borkowski* is now that reflected in *Panetta v R* [2016] NSWCCA 85 that any *Ellis* discount must be numerically quantified. See **Voluntary disclosure of unknown guilt** at [12-218].

As to principle 6, when an aggregate sentence is imposed a separate discount must be applied to each indicative sentence: *Bao v R* [2016] NSWCCA 16 at [41], [44]. See **Aggregate sentences** below.

As to principle 7, a discount for the guilty plea was withheld in *Milat v R* [2014] NSWCCA 29 at [92] on the basis of the extreme circumstances of the murder. The range of cases where no discount may be given extends to those where the sentence imposed is less than the statutory maximum: *Milat v R* at [72], [75]. The plurality in *R v El-Andouri* [2004] NSWCCA 178 at [34] purported to confine the circumstances in which a plea will not warrant any discount to cases where the protection of the

public requires a long sentence, or for which the maximum sentence is appropriate notwithstanding the plea. However, this statement is merely a gloss on the guideline judgment in *R v Thomson and Houlton* (2000) 49 NSWLR 383 and has the potential to misrepresent what the Chief Justice actually said: *Milat v R* at [81], [83]. Spigelman CJ did not define a closed category of cases but merely acknowledged there will be cases where the discount is withheld: *Milat v R* at [84].

Principle 8 in *R v Borkowski*, generally applies subject to Bathurst CJ's statement in *R v AB* at [3] that it is permissible for a court in specific instances to have regard to the reason for the delay in the guilty plea. In *Shine v R* [2016] NSWCCA 149, the applicant at no time denied committing the offence but awaited the outcome of a psychiatric evaluation before entering a plea: at [95]. A similar situation occurred in *Haines v R* [2016] NSWCCA 90. In both cases a utilitarian discount of 25% was warranted in the circumstances notwithstanding the timing of the plea: *Shine v R* at [95]; *Haines v R* at [33].

As to principle 9 in *R v Borkowski*, where the delay in the guilty plea is caused by the offender's legal representative and is not the fault of the offender, its utilitarian value is not undermined: *Atkinson v R* [2014] NSWCCA 262. The whole history of the matter can be considered in assessing the utilitarian value of the plea: *Samuel v R* [2017] NSWCCA 239 at [60]. In *Samuel v R*, the 8-year delay between the offender absconding (after being charged) and his guilty plea in the Local Court, meant his plea could not be characterised as "early". The delay caused unnecessary expenditure of resources and a loss of efficiency for the criminal justice system: at [57]–[59].

Transparency

The guideline encouraged transparency in decision-making and favours expressly quantifying the discount (often expressed as a percentage reduction in the otherwise appropriate sentence) when the court takes a guilty plea into account in sentencing: *R v Thomson and Houlton* (2000) 49 NSWLR 383.

In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ said at [15] that the reason for issuing the guideline:

> included the need to ensure that participants in the New South Wales criminal justice system had no reason to be sceptical about whether or not the benefits of a guilty plea were in fact made available to accused.

Although quantification of the discount is preferable, a failure to do so does not by itself establish error: *R v Simpson* (2001) 53 NSWLR 704 at [82]–[83]; *R v DF* [2005] NSWCCA 259 at [15]; *R v Henare* [2005] NSWCCA 366 at [26].

Whether a failure to explicitly state that a guilty plea has been taken into account indicates it was not given weight depends on the circumstances of the particular case and the content of the reasons: *Woodward v R* [2014] NSWCCA 205 at [6]. Where there is a real possibility the plea was not properly considered, failure to refer to the issue in the judgment should be treated as a material error: *Lee v R* [2016] NSWCCA 146 at [37].

Aggregate sentences

Where a court imposes an aggregate sentence, the discount for the guilty plea must be stated for each indicative sentence, not the aggregate sentence: *Elsaj v R* [2017]

NSWCCA 124 at [56]; *PG v R* [2017] NSWCCA 179 at [71]–[76]; *Berryman v R* [2017] NSWCCA 297 at [29]. However, in *Davies v R* [2019] NSWCCA 45, the court held it was entirely appropriate for the sentencing judge to apply an across-the-board discount in the circumstances of that case where there was no or little information about the plea negotiations for each offence and the pleas were eventually entered at the same time: at [47].

Willingness to facilitate the course of justice

In *Cameron v The Queen* (2002) 209 CLR 339, the majority of the High Court refined the test for taking into account a plea of guilty: at [12]. In their joint judgment, Gaudron, Gummow, Callinan JJ said at [14]:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

According to the majority, a plea of guilty may be taken into account in mitigation of sentence if it evidences a willingness on the part of the offender to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice: at [19]. This is a subjective test and requires more than simply deciding whether economic benefits flow from the plea.

In *R v Sharma* (2002) 54 NSWLR 300 the court held that the reasoning of the majority in *Cameron v The Queen* concerning the application of general sentencing principles, in the context of a WA statute, was not applicable in NSW because the common law principles enunciated there had been modified by statute: at [38]. The court found that the proper construction of s 22 *Crimes (Sentencing Procedure) Act* 1999 permits the sentencer to take into account the objective utilitarian value of the plea: at [62]. Spigelman CJ (with whom Mason P, Barr, Bell and McClellan JJ agreed) said at [52]:

> The mandatory language of s 22 must be followed whether or not by doing so the court can be seen to "discriminate", in the sense that word was used in the joint judgment in *Cameron* … The court must take the plea into account even if there is *no* subjective intention to facilitate the administration of justice. However, viewed objectively, there will always be *actual*, as distinct from *intended*, facilitation of the administration of justice by reason of "the fact" of the plea. The use of the word "must" and the reference to "the fact" of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The *actual* facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

Thus a court must take the plea into account even if there is no subjective intention to "facilitate the administration of justice", as explained in *Cameron v The Queen*. The principles outlined in *R v Thomson and Houlton* (2000) 29 NSWLR 383, regarding the weight to be given to the utilitarian value of the plea, for saving the expense of a "contested hearing", must therefore be given their full force.

The court also held that there was nothing in the NSW Act that expressly or implicitly referred to the common law requirement of "equal justice". While the court

did not doubt the application of this principle in NSW, it was not a principle that must be invoked to construe s 22 restrictively, in the absence of any indication to the contrary: *R v Sharma* (2002) 54 NSWLR 300 at [65]. There was nothing in *Cameron v The Queen* that called into question the ability of a State Parliament to adopt a form of differentiation which may be, or appear to be, "discriminatory" in the sense that the words were used in *Cameron v The Queen*: at [67].

[11-525] Whether guilty plea discount given for Form 1 offences

There is no statutory or common law requirement to take into account that an offender pleaded guilty to an offence if it is being taken into account on a Form 1: *Gordon v R* [2018] NSWCCA 54 at [95]. Requiring a court to consider the procedural history of Form 1 offences when assessing the discount for the guilty plea for the primary offence would add significant complexity to the sentencing task: at [96]–[98].

See **Taking further offences into account (Form 1 offences)** at [13-200]ff.

[11-530] Combining the plea with other factors

Care needs to be taken when there are a number of grounds for extending leniency, such as a plea of guilty with a measure of remorse, as well as the offender's assistance to authorities and promise of future assistance.

Discounts for assistance and a guilty plea should ordinarily be a single, combined figure: *SZ v R* [2007] NSWCCA 19; *R v El Hani* [2004] NSWCCA 162 at [69]; *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [160(ii)]; *R v Gallagher* (1991) 23 NSWLR 220 at 228.

The court held in *SZ v R* at [9] that, since the decision of *R v Thomson and Houlton*, where the utilitarian value of the plea could be as high as 25%, the courts have had less scope to give a discount for assistance in cases of an early plea. A combined discount for pleas of guilty and assistance should not normally exceed 50%: at [3]. A combined discount exceeding 50% should be reserved for exceptional cases: at [53]. It would be in a rare case that a discount of more than 60% would not result in a manifestly inadequate sentence: at [11].

See **Application of discount** at [12-230].

[The next page is 5851]

Court to take other matters into account (including pre-sentence custody)

Section 24 *Crimes (Sentencing Procedure) Act* 1999 provides that the court must take into account time served in custody and the fact that the person has been the subject of a community correction order, conditional release order or an intervention program order.

> **24 Court to take other matters into account**
>
> In sentencing an offender, the court must take into account:
>
> (a) any time for which the offender has been held in custody in relation to the offence, and
>
> (b) in the case of an offender who is being sentenced as a result of failing to comply with the offender's obligations under a community correction order, conditional release order or intervention program order:
>
> (i) the fact that the person has been the subject of such an order, and
>
> (ii) anything done by the offender in compliance with the offender's obligations under the order, and
>
> (c) in the case of an offender who is being sentenced as a result of deciding not to participate in, or to continue to participate in, an intervention program or intervention plan under an intervention program order, anything done by the offender in compliance with the offender's obligations under the intervention program order, and
>
> (d) in the case of an offender who is being sentenced following an order under section 11(1)(b2):
>
> (i) anything done by the offender in compliance with the offender's obligations under the order, and
>
> (ii) any recommendations arising out of the offender's participation in the intervention program or intervention plan.

[12-500] Counting pre-sentence custody

The ambit of the phrase in s 24(a) — "any time for which the offender has been held in custody in relation to the offence" — has been a source of ambiguity. The provision is silent on the question of whether pre-sentence custody attributable both to other offences and the offence for which the offender stands for sentence should be taken into account. The section also leaves the issue of exactly how such time is to be taken into account to the sentencer's discretion.

Section 47(2) *Crimes (Sentencing Procedure) Act* 1999 allows the court to direct that a sentence is taken to have commenced before the date on which the sentence is imposed ("backdating") and s 47(3) provides, inter alia, that:

> … in deciding the day on which the sentence is taken to have commenced, the court must take into account any time for which the offender has been held in custody in relation to the offence to which the sentence relates.

The section does not oblige a court to backdate a sentence, but the pre-sentence custody served by an offender "in relation to the offence" must be taken into account when deciding whether the sentence should commence before the sentence date: *Kaderavek v R* [2018] NSWCCA 92 at [20].

An offender granted bail on one charge is not in custody "in relation to" it for the purposes of s 47(3) if they are being held on remand for an unrelated charge: *Rafaieh v R* [2018] NSWCCA 72 at [44], [50]. The fact an offender is not entitled to be released from custody for one offence but was granted bail in respect of another does not alter their bail status in respect of the latter: at [59]–[60].

Section 47(2)(b) provides for a court to direct that a sentence of imprisonment commence on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly consecutively) with some other sentence of imprisonment. See further **Forward dating sentences of imprisonment** at [7-547].

Backdating the sentence is usual practice

Backdating a sentence by a period equivalent to the pre-sentence custody is the preferable, and usual, approach: *Wiggins v R* [2010] NSWCCA 30 at [2], [3]–[6]; *Martinez v R* [2015] NSWCCA 5 at [19]; *Salafia v R* [2015] NSWCCA 141 at [65]; *Kaderavek v R* [2018] NSWCCA 92 at [20]. Before the enactment of the provisions of the Act, it was accepted at common law, in cases such as *R v McHugh* (1985) 1 NSWLR 588, that where there had been a continuous period of pre-sentence custody, the practice was to backdate a sentence to take account of pre-sentence custody, rather than to discount or reduce it. Nothing in s 47 of the Act prevents backdating a sentence for an offence even where there has been discontinuous custody: *R v Newman and Simpson* [2004] NSWCCA 102 at [26].

In *R v Newman and Simpson* at [26]–[31], Howie J summarised the reasons in favour of backdating:

- It preserves the denunciatory and deterrent value of the sentence so that it is, and appears to be, adequate both to public perception and when it appears in statistical information.
- It makes it clear to the defendant and to the appeal court that the offender has received a reduction in sentence for pre-sentence custody.
- It avoids questions of disparity when comparing one sentence to another that has been markedly reduced by pre-sentence custody.
- It avoids skewing statistical information on that offence where there are very few comparable sentences for similar offences and avoids giving a false indication of the range of sentence that have been imposed for a similar offence or similar offender.
- It avoids lengthy sentences being imposed in years, months and days, which may suggest that sentencing is an exact science and that a sentence can be determined to a precise number of days.

When reducing a sentence may be appropriate

The length of a sentence should not be discounted unless reasons are clearly articulated for adopting that approach: *Wiggins v R* at [3], [8]; *R v Newman and Simpson* at [25]; *R v Jammeh* [2004] NSWCCA 327 at [18] and *R v Howard* [2001] NSWCCA 309 at [24]. However, there are some situations where it will not be appropriate or even permissible to backdate a sentence and, in such cases, the sentence can be reduced to take this time into account.

One such situation, identified by Badgery-Parker J in *R v Deeble* (unrep, 19/9/91, NSWCCA) at 3–4 and applied in *R v Leete* [2001] NSWCCA 337 at [29], is where a sentencer may reduce a sentence to three years or less, thereby making an offender's release upon expiry of the non-parole period an entitlement rather than based on eligibility: *Wiggins v R* at [8]; *White v* R [2009] NSWCCA 118. See also s 158 *Crimes (Administration of Sentences) Act* 1999.

Another relates to the nature of the sentencing option selected by the sentencer as it is not possible to backdate some sentencing options. Intensive correction orders (ICOs), community correction orders and community release orders each commence on the date on which they are made (ss 71(2), 86 and 96 respectively) and therefore cannot be backdated to take into account any period of pre-sentence custody. Thus, any such period must be taken into account by reducing the term of sentence. Taking this approach with respect to an ICO was endorsed by the court in *Mandranis v R* [2021] NSWCCA 97 at [61]. See also *R v Edelbi* [2021] NSWCCA 122 at [79]–[80].

Method of crediting custody time

Where a defendant is given credit for a period of pre-sentence custody, this time should be reflected in both the total sentence and the non-parole period: *R v Newman and Simpson* at [25] and *R v Youkhana* [2005] NSWCCA 231 at [10]. Under the proper approach — fixing the sentence and the non-parole period, and then making allowance for the period in custody — the applicant gets the benefit of the whole of the period served where it is deducted from the non-parole period. The judge erred in *R v Youkhana* by taking into account the periods spent in custody when setting the head sentence. The period spent in custody must be deducted from the whole of the sentence including the non-parole period. The difference between the approach adopted and the correct approach is most obvious when there is no finding of special circumstances. In such a case, the offender obtains the benefit of only 75% of the period served by way of a reduction in the non-parole period. The mathematical problem would not have arisen had the judge backdated the commencement of the sentence.

On some occasions it is sufficient for a sentencing judge to express in the remarks on sentence that a period of pre-sentence custody has been "taken into account": *R v Frascella* [2001] NSWCCA 137; *R v Rose* [2001] NSWCCA 370 and *R v Deron* [2006] NSWCCA 73 at [9]. However, such an incantation may not be sufficient where there has been an irregular period of pre-sentence custody. Where a sentence is expressed in whole years, it may be more difficult to infer the sentencing judge has actually taken this period of custody into account: *R v Galati* [2003] NSWCCA 148.

In *R v Bushara* [2006] NSWCCA 8 at [37] it was held that when sentencing an offender for multiple offences, a judge must ensure that pre-sentence custody is deducted from the aggregate non-parole period. Consideration must be given to the period of pre-sentence custody when considering the relationship between the aggregate non-parole period and balance of the term: at [22], [24], [35]. The effective sentence in *Bushara* did not reflect the finding of special circumstances.

It is an error for a judge to revoke bail so a period of custody counts towards the sentence by reason of s 24(a): *R v West* [2014] NSWCCA 250. In *R v West*, the judge unilaterally revoked the offender's bail while an intensive correction order (ICO) report was obtained, stating this gave the offender about four months of full-time custody, after which the judge imposed an ICO for a period of two years. This approach did not

accord with usual sentencing practice which requires that the sentencing discretion be exercised immediately before a sentence is passed, rather than conditionally in advance and in two stages: at [36], [41], [43].

[12-510] What time should be counted?

Parole revoked as a consequence of a subsequent offence

When a person commits an offence whilst on parole, they may spend time in custody referable to that offence ("the second offence"), if bail is refused. However, the Parole Authority may, on occasions, revoke the person's parole due to the second offence and order the person to serve the remaining period of the first sentence. An offender may thus be in custody referable to two offences; namely, the revocation of parole for the first offence(s) and the second offence.

Where parole is revoked as a consequence of the commission of a subsequent offence(s), it is a matter within the sentencer's discretion whether the subsequent sentence should be backdated only to the time the offender was taken into custody for the subsequent offence: *Callaghan v R* [2006] NSWCCA 58 at [21]–[23]. Simpson J said at [22]–[23]:

> [22] … a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.
>
> [23] It would, in my opinion, in some cases be unfair not to backdate to some point (not necessarily the date of revocation of parole) before the expiration of the earlier parole period. It is always open to an offender to seek and be granted parole even after a revocation; to sentence in such a way as to commence the subsequent sentence only on the date of expiration of the whole of the previously imposed head sentence is to assume that, absent the subsequent offences, the offender would not have been granted a second chance at parole.

A number of matters inform the exercise of the discretion: first, the fact that imprisonment for the period of the revoked parole is due to the original sentence and revocation occurred because the offender had been unable to adapt to civilian life; second, the fact that the revocation arises in consequence of a new offence for which a fresh sentence is being imposed, rather than for some unconnected cause; third, the proportion of time the offender complied with the terms of parole; and, fourth, the periods of revocation: *R v DW* [2012] NSWCCA 66 at [35].

This principle does not apply if parole has not been revoked by the Parole Authority. In a case where an offender has committed a subsequent offence, the court should not treat parole as having been notionally revoked: *R v Skondin* [2006] NSWCCA 59 at [16]–[17].

In *R v Callaghan* and *R v DW*, parole was revoked for an earlier sentence solely due to commission of the second set of offences. The court in both cases held that the judge did not err by refusing to backdate to the date the applicant was taken into custody.

Parole revoked as a consequence of breach of another condition of parole

Where parole is revoked for unrelated reasons, such as a breach of the conditions of parole and not the commission of the subject offence (for example, reporting or non-association requirements or for an unrelated offence), time spent in custody as

a consequence of the breach is not taken into account upon sentence for the second offence: *R v Bojan* [2003] NSWCCA 45 and *R v Walker* [2004] NSWCCA 230. This time is not "referable" to the second offence, as required by ss 24 and 47 *Crimes (Sentencing Procedure) Act* 1999. As an example, see *R v Kitchener* [2003] NSWCCA 134 at [56] (a two-judge bench case).

However, the matter is not as clear cut as it seems. The parole status of the defendant may be affected by the commission of the second offence. In such a case, the court may need to attempt the hypothetical exercise of deciding what the applicant's parole position would have been, had the second offence not been committed: *R v Walker*. It was said in *R v Walker* that the court will need to determine whether the second offence has caused a continuation of the revocation of parole. In *R v Walker* it was held that where the revocation of parole has been continued partly due to the commission of the second offence, pre-sentence custody referable to the continuation of the revocation of the parole may be taken into account upon sentence for the second offence.

A court has a discretion to impose a partially concurrent or wholly cumulative sentence upon a revoked parole period. The discretion has to be exercised in a principled way: *Barnes v R* [2014] NSWCCA 224 at [28]–[29].

In *Barnes v R*, the applicant had his parole revoked for an offence and was then sentenced for a subsequent offence with the sentence to commence at the expiry of the revoked parole period. The court, at [27], rejected the applicant's argument that imposing a sentence that was totally cumulative made no allowance for the offender having a second chance at parole for the first offence.

Time already counted in previous proceedings

If a court takes account of the whole period of pre-sentence custody, it is not appropriate to again take that pre-sentence custody into account when sentencing the defendant for the second group of offences: *R v Wood* [2005] NSWCCA 159 at [5]; *Martinez v R* [2015] NSWCCA 5.

Time spent in custody in relation to another matter for which the offender is acquitted

Where an offender is sentenced in relation to one matter, time spent in custody referable exclusively to an unrelated offence, which has been successfully appealed, is not to be taken into account as a form of credit: *R v Niass* (unrep, 16/11/88, NSWCCA); *R v David* (unrep, 20/4/95, NSWCCA). In *R v Niass*, Lee CJ at CL said at 2:

> … there is good reason to keep intact the division between the functioning of the court dealing with a particular offender in respect of the offence on which he comes before the court and taking into account periods spent in custody in respect of that offence, and the function which the State has undertaken on occasions to recompense persons who, when the justice system has miscarried may seek solatium.

R v Niass was subsequently confirmed by the five-judge bench decision of *Hampton v R* [2014] NSWCCA 131 at [35].

Although not taken into account as a form of credit, time spent in custody in relation to another offence, which is successfully appealed, may be taken into account where the sentence has been served under particularly onerous conditions. In *R v Evans* (unrep, 21/5/92, NSWCCA), whether the respondent was returned to custody was relevant

to his rehabilitation and to an assessment of his culpability, since his "capacities of self-control had been weakened by the experience he had endured" through no fault of his own.

In *R v Karageorge* [1999] NSWCCA 213 it was held that the time spent in custody was referable not only to the offence, which was subsequently successfully appealed, but also to a different offence, for which the offender was sentenced. The case emphasises the prudence for defence representatives of ensuring bail is formally refused to enable the custody time to be "referable" to that offence.

Similarly, time spent in custody in relation to offences for which an offender is discharged or acquitted is not to be taken into account as a form of credit: *Hampton v R* at [27]; *Rafaieh v R* [2018] NSWCCA 72 at [74]. Bare reliance on a period of custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters, particularly in the case of broken periods of custody: *Hampton v R* at [30].

Although statutory provisions in NSW confirm that time in custody relating to the instant offence is a mandatory factor to be taken into account on sentence, there is nothing requiring a judge to take custody for an unrelated offence into account: *Hampton v R* at [26], [28]; *Rafaieh v R* at [74]; ss 24(a), 47(3) *Crimes (Sentencing Procedure) Act*.

Pre-sentence custody served in protection

The courts no longer assume that being in protective custody will place an offender in a more onerous prison environment than that of the general prison population: *Clinton v R* [2009] NSWCCA 276. If an offender wants such a consideration taken into account, the offender should present evidence of it: *R v Jarrold* [2010] NSWCCA 69 [26]–[27]. Where an offender has spent a period of pre-sentence custody in protection which is more onerous, this may be given greater value than the actual time spent in custody: *R v Rose* [2004] NSWCCA 326. The reduction depends on the circumstances of the particular case.

The decision of *R v Rose* "is not authority for a mathematical approach to determining the relevance of time spent in protection": *Clinton v R* at [21]. A mathematical formula is not appropriate as there are too many variables, there is not always a significant difference between being on protection and being part of the normal prison population and there may be some benefits from being on protection that offset some of the deprivations: at [25].

Form 1 offences and pre-sentence custody

Pre-sentence custody referable to a Form 1 matter "should normally be taken into account" by backdating the sentence for the principal offence to which the Form 1 is attached, because Form 1 matters "normally have an impact, sometimes a substantial impact on the sentence passed for the principal offence": *Sultana v R* [2007] NSWCCA 107 at [15].

Immigration detention

A court may have regard to detention in an immigration facility notwithstanding an offender has been granted bail for an offence. The sentencing judge in *R v Parhizkar* [2013] NSWSC 871 took into account "in an unquantifiable sense" that the length

of time the offenders were kept in immigration detention was "exacerbated by the fact that there have been pending criminal proceedings against them": at [108]. On appeal, the applicant argued that he should have been given a quantified allowance for immigration detention: *Parhizkar v R* [2014] NSWCCA 240 at [69]. Basten JA noted at [70] that the argument was not drawn to the judge's attention and that no evidence of the circumstances of the period in immigration detention was presented to the judge. Basten JA held (Price J at [93] and McCallum J at [98] agreed) that in those circumstances it could not be said the judge erred in the approach that was taken.

In *R v Dadash* [2012] NSWSC 1511, immigration detention after the offender was granted bail was taken into account as part of the backdating of the sentence.

In the ACT, immigration detention time linked to the offending is taken into account: *Islam v R* [2014] ACTCA 2 at [6]. The Crown conceded before the sentencing judge that the seven-month-period of immigration detention while Mr Islam was awaiting trial should be accounted for in determining the backdating of his sentence: at [7]. The backdating provision in s 63(2) *Crimes (Sentencing) Act* 2005 (ACT) uses the same expression — "held in custody in relation to the offence" — in s 24 *Crimes (Sentencing Procedure) Act* 1999 (NSW).

[12-520] Intervention programs

Section 24(b) *Crimes (Sentencing Procedure) Act* 1999 requires a sentencing court to take into account the fact an offender has been the subject of an intervention order and "anything done by the offender in compliance with the offender's obligations under the order". Part 4 of the *Criminal Procedure Act* 1986 provides for the recognition and operation of intervention programs. According to s 346, an intervention program is "a program of measures declared to be an intervention program under s 347." Clause 31 *Criminal Procedure Regulation* 2017 declares that the Circle Sentencing Intervention Program is an intervention program for the purposes of Ch 7, Pt 4 of the *Criminal Procedure Act* 1986: see **Intervention programs** at [5-430].

An accused person or offender may be referred to an intervention program:

- as a condition of bail under the *Bail Act* 2013
- with an adjournment and a grant of bail before a finding of guilt is made
- where there is a finding of guilt and a dismissal of charges without a conviction under s 10 of the *Crimes (Sentencing Procedure) Act*, or
- where sentence is deferred under s 11.

See Note to Ch 7, Pt 4 *Criminal Procedure Act* 1986.

Section 11(4) *Crimes (Sentencing Procedure) Act* permits the court to make an order that an offender may participate, or be assessed for participation, in a program for treatment or rehabilitation that is not an intervention program.

[12-530] Quasi-custody bail conditions — residential programs

Time spent in a residential program, either in conformity with a bail requirement or under a s 11 adjournment, may constitute a period of quasi-custody, which may be taken into account to reduce the sentence eventually imposed: *R v Eastway* (unrep, 19/5/92,

NSWCCA); *R v Campbell* [1999] NSWCCA 76; *R v Delaney* (2003) 59 NSWLR 1; *Kelly v R* [2018] NSWCCA 44. This may be done by reducing or backdating the sentence: *Reddy v R* [2018] NSWCCA 212 at [31]. A failure of a court to take account of time actually spent in a residential program constitutes an error in the exercise of the sentencing discretion: *Renshaw v R* [2012] NSWCCA 91 at [29]; *Hughes v R* [2008] NSWCCA 48 at [38]. Where there is an evidentiary foundation for it to be taken into account, the sentencing judge may be obliged, in some circumstances, to have regard to it even when not specifically requested: *Bonett v R* [2013] NSWCCA 234 at [50]; see also *Kelly v R* at [48]–[49].

Residential rehabilitation programs that have constituted quasi-custodial conditions include Odyssey House, the Salvation Army's Bridge Program, Guthrie House, Selah House, the Glen Rehabilitation Centre, ONE80TC (a Teen Challenge initiative), the Northside Clinic, Byron Private Treatment Centre, William Booth House and Bennelong Haven.

A reduction in sentence does not depend entirely on whether the residential program has been productive. The rationale for the allowance is the need to factor into the sentencing exercise the restriction on the offender's liberty during the period of the program: *Truss v R* [2008] NSWCCA 325 at [22]; *R v Marschall* [2002] NSWCCA 197 at [30]; see also *Hughes v R* [2008] NSWCCA 48 at [38]; *Kelly v R* at [4], [11], [46]. Nor is the offender's motive for undertaking the program a relevant consideration when determining entitlement to some credit as a result of being subjected to quasi-custody: *R v Delaney* at [23]. As it is invariably the offender who moves the court for an order to enable attendance at a program, such attempts at rehabilitation are to their credit: *Reddy v R* at [33].

To qualify for a discount on sentence the conditions on the program must closely resemble imprisonment and thus impose a form of punishment on the defendant. Whether the conditions imposed amount to quasi-custody is a question of fact: *Kelly v R* at [10], [50]; *Bonett v R* at [50].

Factors relevant to that determination include:

- whether the course was residential: *R v Eastway*; *Kelly v R* at [11]
- whether the environment is a disciplined one, and how strict that discipline is: *R v Delaney* at [22]; *Kelly v R* at [11]
- whether the person is subject to restrictions and if so, the nature and extent of those restrictions: *R v Campbell* at [24]; *Kelly v R* at [3], [11]
- whether the time spent in rehabilitation has been productive: *Hughes v R*; *Kelly v R* at [11].

If conditions amounting to quasi-custody are established, the extent to which the sentence should be adjusted is a matter of discretion for the sentencing judge: *Kelly v R* at [50]; *Bonett v R* at [50]. The discount given for time spent in a residential program does not need to be quantified: *R v Sullivan* [2004] NSWCCA 99 at [67]. However, a figure of between 50–75% of the period spent on the program has been allowed in a number of cases: *R v Cartwright* (1989) 17 NSWLR 243; *R v Eastway*; *R v Douglas* (unrep, 4/3/97, NSWCCA); *Kelly v R* at [51], [53]; *Hughes v R* at [38]. This figure may be reduced as the conditions in the program become less strict: *R v Psaroudis* (unrep, 1/4/96, NSWCCA).

MERIT — Magistrates Early Referral Into Treatment program

The completion of a MERIT program should not be equated with a period of quasi-custody: *R v Brown* [2006] NSWCCA 144. James J said at [59] that if any allowance was made "it would, in my opinion, only be a very small allowance".

Hodgson JA said at [4] that completion of the program was a powerful consideration in the applicant's favour. He went on to say:

> I think there is public interest in having successful completion of such a program explicitly adverted to as a factor favourable to a defendant in the sentencing process, in order to encourage others to successfully complete such programs.

Drug Court

The approach to participation in the Drug Court program prior to being sentenced should be the same as when an offender has been on bail for a lengthy period with strict conditions: *R v Bushara* [2006] NSWCCA 8 at [28]. Participation in the Drug Court is not equivalent to imprisonment. It is not a form of pre-sentence custody that would require a sentence to be backdated. The fact of participation is simply another matter the court takes into account when considering the appropriate sentence without attributing to it "any mathematical equivalence that would have a direct bearing on the length of the sentence".

See **Diversionary programs** on JIRS for further information on diversionary and intervention programs.

Other onerous bail conditions

Onerous bail conditions may be taken into account at sentence but there is no obligation to do so. It is a discretionary matter which depends on the circumstances of the individual case: *R v Fowler* [2003] NSWCCA 321 at [242]; *R v Webb* [2004] NSWCCA 330 at [18]; *Hoskins v R* [2016] NSWCCA 157 at [36]; *Frlanov v R* [2018] NSWCCA 267 at [24]; *Banat v R* [2020] NSWCCA 321 at [18].

The test of what is "onerous" or "stringent" seems difficult to satisfy. Delay combined with onerous bail conditions may constitute a form of punishment to be taken into account on sentence: see, for example, *R v Khamas* [1999] NSWCCA 436; see also **Relevance of onerous bail conditions during delay** at **[10-530] Delay**. Under the *Bail Act* 2013, bail conditions imposed for the purpose of mitigating an unacceptable risk may require the defendant to report or reside at a particular residence, or may include financial requirements (such as giving security) and non-association and place restriction conditions. Restrictive accommodation requirements will not necessarily amount to a form of quasi-custody: *Bland v R* [2014] NSWCCA 82 at [128]. In *Banat v R* the imposition of a curfew condition and the requirement for electronic monitoring were appropriately taken into account on sentence: at [25]–[27]. By comparison, in *Frlanov v R* the sentencing judge did not err by not taking into account the applicant's daily reporting condition as that was not particularly onerous: at [26].

The nature of the offence and the purposes of punishment may determine whether bail conditions are taken into account upon sentence: *R v Fowler* at [242]. In *R v Fowler* the applicant argued that the sentencing judge had failed to take into account the lengthy period during which the applicant was subject to bail conditions (including reporting). However, the court held at [242] that while in an appropriate case the length and terms

of an offender's period on bail awaiting trial or sentence is relevant to determining the proper sentence, the weight given to such a matter will vary, depending upon other factors to be considered and what sentence is required in the particular case to address the purpose of punishment.

There is no specific formula for taking into account onerous bail conditions and delay. Nor is there a principle that dictates a reduction in sentence as a direct equivalent of a period of time spent subject to strict conditions on bail: *Hoskins v R* at [36]. It is enough for a sentencing court to make clear in its remarks that those factors have been recognised and taken into account. While in *R v Cartwright* the court gave the appellant credit for 75% of the time spent on bail, this figure has not been applied more generally.

Delay in proceedings

The length of time spent on bail due to delay in the proceedings may, similarly, be seen as a form of punishment sometimes referred to as a "penal consequence" already suffered by an offender that may be taken into account: *R v Yeo* [2005] NSWCCA 49 at [109]; *R v Fowler* [2003] NSWCCA 321 at [242]–[243].

[The next page is 6021]

Sexual offences against children

This chapter should be read in conjunction with **Sexual assault** at [20-600]ff.

[17-400] Change in community attitudes to child sexual assault

The abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in *R v BJW* [2000] NSWCCA 60 at [20], where Sheller JA stated:

> The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim. See the remarks of Kirby ACJ in *R v Skinner* (1994) 72 A Crim R 151 at 154.

The case of *R v Fisher* (unrep, 29/3/89, NSWCCA) at 6 is also frequently cited:

> This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations …
>
> This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults …

Tampering with children of tender years is a matter of grave concern to the community: *R v Evans* (unrep, 24/3/88, NSWCCA).

The courts have recognised a change in community attitudes to child sexual assault. In *R v MJR* (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> … has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.

Increased penalties

See also **Sexual assault** at [20-610].

In *R v ABS* [2005] NSWCCA 255 at [26], Buddin J, with whom Brownie AJA and Latham J agreed, said:

> Offences involving acts of significant sexual exploitation against children are almost without exception met with salutary penalties. Moreover, the legislature has in recent years provided for increased penalties in respect of many such offences. It is an area in which the need to protect children from exploitation and to deter others from acting in a similar fashion assume particular significance.

According to *R v PGM* [2008] NSWCCA 172 at [37], the seriousness with which sexual offences against young children must be viewed is reflected in the increase in the maximum penalty for s 66A *Crimes Act* 1900 offences from 20 to 25 years (effective 1 February 2003) and the introduction of a standard non-parole period of 15 years: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

[17-410] Sentencing for historical child sex offences — s 25AA

Section 25AA(1) *Crimes (Sentencing Procedure) Act* 1999 provides that a court must sentence an offender for a child sexual offence in accordance with the sentencing patterns and practices at the time of sentence, not the time of the offence. The provision took effect on 31 August 2018: *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018, s 2; LW 31.08.2018.

"Child sexual offence" is defined in s 25AA(5). It does not matter when the offence was committed but s 25AA only applies if, at the time, the victim was under 16 years old.

The provision overrides the common law principle expressed in *R v MJR* (2002) 54 NSWLR 368 that a court must apply the sentencing patterns and practices existing at the time of the offence: Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, NSW, Legislative Assembly, *Debates*, 6 June 2018, p 7. As to the rationale for the enactment of s 25AA and the previous common law see: *R v Cattell* [2019] NSWCCA 297 at [103]–[126]; *Corliss v R* [2020] NSWCCA 65 at [73]–[94] (Johnson J); [131]–[139] (Lonergan J).

In addition to sentencing in accordance with sentencing patterns and practices at the time of sentence, the court must also have regard to the trauma of sexual abuse on children as understood at the time of sentence, which may include recent psychological research or the common experience of courts: s 25AA(3). Justice Price, in *R v Cattell* at [121], said "current sentencing practices" understand the harmful effects of sexual offending against children and would also include the court setting a non-parole period in accordance with s 44 *Crimes (Sentencing Procedure) Act* 1999.

Sentencing practices and patterns are not defined. Given the relatively recent enactment of s 25AA, parties will be unable to provide sufficient Judicial Commission statistical material to assist the court in determining "current sentencing patterns": *R v Cattell* at [122].

The relevant standard non-parole period (if any) is that applying at the time of the offence: s 25AA(2).

Section 19, which deals with the effect of alterations in penalties, is not affected: s 25AA(4). Accordingly, the maximum penalty that applied when the offence was committed applies on sentence.

In *Corliss v R*, Johnson J described ss 25AA(2) and 25AA(4) as constituting "the express statutory qualifications to the otherwise absolute operation of [s 25AA]": at [87]. The overall effect of s 25AA is that, aside from the statutory guideposts of the maximum penalty and the applicable standard non-parole period, those matters previously identified as typically leading to a lesser sentence in historic cases cannot

be taken into account. However, a court may consider the fact a historical offence encompassed a wider range of more serious conduct than would constitute the equivalent current offence: *O'Sullivan v R* [2019] NSWCCA 261 at [36], [46].

The Local Court must apply s 25AA when sentencing for child sex offences: see for example *DPP v IJL* [2020] NSWLC 2.

The approach to s 25AA

In *R v Cattell* [2019] NSWCCA 297 at [123], Price J said a court sentencing an offender for an offence falling within s 25AA should:

- take into account the sentencing pattern existing at the time of sentence where such a pattern is able to be discerned
- determine the facts as now available to the court
- have regard to the maximum penalty and standard non-parole period (if any) applying at the time of the offence
- identify where the offence falls in the range of objective gravity
- take into account any relevant aggravating and mitigating factors in s 21A(2) and (3)
- set a non-parole period in accordance with s 44 as operative at the time of sentence
- fix the balance of the term.

The sentencing court should expressly state that the offender has been sentenced in accordance with s 25AA(1) and explain how the court has had regard to the trauma of sexual abuse on the child: *R v Cattell* at [125].

The breadth of conduct encompassed by a particular historical offence is likely to influence the identification of where a particular offence falls in the range of objective seriousness. This assumes some significance when s 25AA applies because certain historical offences incorporated conduct which is now the subject of separate offences with significantly higher maximum penalties. For example, the offence of indecent assault in s 81 *Crimes Act* 1900 (rep) which carried a maximum penalty of 5 years included conduct that would now constitute sexual intercourse. Part of the rationale for the increased, or changed, penalties is recognition of the harm caused by these offences: see, for example, *MC v R* [2017] NSWCCA 316 at [40]–[44]; *Woodward v R* [2017] NSWCCA 44 at [46]–[54].

Decision Restricted [2020] NSWCCA 275 and *WB v R* [2020] NSWCCA 159 include some general observations about how the requirements of s 25AA can be satisfied given what is now known about the long-term effects of child sexual abuse when the maximum penalties for historical offences were lower than for current offences. In *WB v R*, Davies J (Bell P and N Adams J agreeing) acknowledged, in relation to the s 81 (rep) offences the subject of appeal in that case, that it had been superseded by offences with higher penalties, observing at [63]:

> Part of the reason for the heavier penalties is, obviously, that there is now much greater knowledge of the long-term effects of sexual abuse of a child or young person than was [previously] known... That may mean that it will be easier to find that damage or emotional harm is substantial where historical offences are dealt with under earlier legislation with much lower maximum penalties. Such an approach would not be inconsistent with the rationale behind s 25AA…

The operation of s 25AA was not otherwise considered in that case. Subsequently in *Decision Restricted* [2020] NSWCCA 275, N Adams J (Rothman J agreeing) after endorsing that aspect of *WB v R* said, at [164], that "it may well be easier to make a finding of substantial injury to a child for a sentence imposed on a historical child sexual assault offence after the enactment of s 25AA if the maximum penalty is so low as to enable a conclusion that the significant lifelong trauma such offending can inflict on a child is not already reflected in the maximum penalty." In that case one of the grounds of the Crown appeal against sentence, which was accepted by the court, was that the impact of the offending on the victims was not reflected in the aggregate sentence that had been imposed.

However, the impact of offending on the victim is taken into account under s 3A(g) *Crimes (Sentencing Procedure) Act*. Recognition of the harm caused by child sexual assault is a necessary incident of sentencing in such cases in any event and, where there is evidence, substantial harm caused to a victim falling within s 21A(2)(g) is taken into account: see further **[12-830] Evidentiary status and use of victim impact statements on sentence** and **[12-832] Victim impact statements and harm caused by sexual assault**.

Where there are numerous sexual offences and some occur when the victim is 16 or 17 years old, the sentencing court must expressly state when s 25AA applies and when it does not: *R v Cattell* at [115]–[116]. In *Franklin v R* [2019] NSWCCA 325 the applicant's offending extended over a period when the victim was between five and 17 years old. The court dismissed the appeal but said if it had been necessary to resentence, s 25AA could only apply to the offences committed when the victim was under 16 years old and general law principles with respect to sentencing for historical sexual offences would apply to the balance: at [145]. As to the difficulties of applying the principle of totality in this situation, see *R v Cattell* at [152]. There is a degree of artificiality in attempting to do so. See also *Cunningham v R* [2020] NSWCCA 287 at [32]–[33].

Juvenile offenders

Section 25AA applies if a juvenile offender commits a child sexual offence but is sentenced as an adult. In *JA v R* [2021] NSWCCA 10 at [62] the court commented on the difficulties in sentencing in such circumstances.

Resentencing following successful appeal

The Court of Criminal Appeal is yet to authoritatively determine whether s 25AA applies where the court finds error with respect to a sentence passed before s 25AA commenced but is required to resentence after s 25AA commenced. In *GC v R* [2019] NSWCCA 241, the court proceeded on the basis s 25AA would apply on re-sentence (error having been found). However, as the court would have imposed a higher sentence than that at first instance, the appeal was dismissed. In *Corliss v R* differing obiter observations were expressed on this issue. Johnson J (Lonergan J agreeing) concluded it was clear from the text of s 25AA that the legislature intended to abolish forthwith the general law principles relating to sentencing for historical child sexual offences and that s 25AA would have applied if the applicant had demonstrated error and it was necessary to re-sentence him: [67], [92], [97]–[99]. However, Brereton JA dissented on this issue: see at [10]–[21]. See also *Franklin v R*.

Additional resources

H Donnelly "Sentencing according to current and past practices", paper presented at *Sentencing: New Challenges* conference, National Judicial College of Australia on 29 February 2020 at https://njca.com.au/wp-content/uploads/2020/03/Sentencing-for-historical-offences-Donnelly-H.pdf, accessed 22 July 2021.

[17-420] Statutory scheme in the Crimes Act 1900 (NSW)

Table 1 lists the provisions in the *Crimes Act* 1900 which create sexual offences against children.

Sections 61L and 61M(1) are sexual offences of general application that, in their standard form, apply both to adults and children (see s 77, discussed below). Sections 61N(1), 61O, 66A–66EB, 73, and 91G–91H *Crimes Act* 1900 specifically and exclusively pertain to sexual offences against children. Sections 61J, 61M(1), 61M(2), 80A(2A)(b), 80D(2) and 91J–91L pertain to sexual offences against children by way of aggravation.

Before the commencement of the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010 on 17 September 2010, the *Crimes Act* 1900 defined "child pornography" as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to a reasonable person, a person who is (or appears to be) a child:

(a) engaged in sexual activity

(b) in a sexual context, or

(c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

For offences committed from 17 September 2010, such material, which is now more broadly defined, is referred to as "child abuse material" and is defined in s 91FB(1).

Table 1: Sexual offences against children under the Crimes Act 1900

Section	Offence	Max (yrs)*	Commentary
s 61J(1)	Aggravated sexual assault	20 *[SNPP 10]*	[17-505]
s 61M(1)	Aggravated indecent assault	7 *[SNPP 5]*	[17-510]
s 61M(2)	Aggravated indecent assault — child under 16 years	10 *[SNPP 8]*	[17-510]
s 61N(1)	Act of indecency — child under 16 years	2	[17-520]
s 61N(2)	Act of indecency — person 16 years or above	1.5	[17-520]
s 61O(1)	Aggravated act of indecency — child under 16 years	5	[17-520]
s 61O(1A)	Aggravated act of indecency — person 16 years or above	3	[17-520]
s 61O(2)	Aggravated act of indecency — child under 10 years	7	[17-520]
s 61O(2A)	Aggravated act of indecency — child under 16 years (knowing it to be filmed for producing child abuse (previously "child pornography") material)	10	[17-520]
s 66A	Sexual intercourse — child under 10 years	life *[SNPP 15]*	[17-480]
s 66B	Attempting or assaulting with intent to have sexual intercourse with child under 10 years	25 *[SNPP 10]*	[17-480]

Section	Offence	Max (yrs)*	Commentary
s 66C(1)	Sexual intercourse — child between 10 and 14 years	16 *[SNPP 7]*	[17-490]
s 66C(2)	Aggravated sexual intercourse — child between 10 and 14 years	20 *[SNPP 9]*	[17-490]
s 66C(3)	Sexual intercourse — child between 14 and 16 years	10	[17-490]
s 66C(4)	Aggravated sexual intercourse — child between 14 and 16 years	12 *[SNPP 5]*	[17-490]
s 66D	Attempting or assaulting with intent to have sexual intercourse with child between 10 and 16 years	as per s 66C(1) or s 66C(3)	—
s 66E	Alternative verdicts available	n/a	—
s 66EA	Persistent sexual abuse of a child	25	[17-500]
s 66EB(2)(a)	Procuring child for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2)(b)	Procuring a child for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(3)(a)	Grooming a child for unlawful sexual activity — child under 14 years	12 [*SNPP 5*]	[17-535]
s 66EB(3)(b)	Grooming a child for unlawful sexual activity — child under 16 years	10 [*SNPP 4*]	[17-535]
s 73(1)	Sexual intercourse with child above 16 years and under 17 years who is under special care	8	[17-530]
s 73(2)	Sexual intercourse with child above 17 years and under 18 years who is under special care	4	[17-530]
s 80A(2A)(b)	Aggravated sexual assault by forced self-manipulation	20	[20-720]
s 80D(2)	Aggravated causing sexual servitude	20	[17-540]
s 80G	Incitement to commit a sexual offence	Same as penalty for substantive offence	[17-545]
s 91D(1)	Promoting or engaging in acts of child prostitution — child 14 years or above	10	[17-540]
s 91D(1)	Promoting or engaging in acts of child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child 14 years or over	10	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91F(1)	Premises not to be used for child prostitution	7	[17-540]
s 91G(1)	Children not to be used for production of child abuse (previously “child pornography”) material — child under 14 years	14 [*SNPP 6*]	[17-541]
s 91G(2)	Children not to be used for production of child abuse (previously “child pornography”) material — child 14 years or above	10	—

Section	Offence	Max (yrs)*	Commentary
s 91H(2)	Possession, production or dissemination of child abuse (previously "child pornography") material	10	[17-541]
s 91J(1)	Voyeurism	100 penalty units or 2 years or both	[17-543]
s 91J(3)	Aggravated voyeurism	5	[17-543]
s 91K(1)	Filming a person engaged in a private act	100 penalty units or 2 years or both	[17-543]
s 91K(3)	Aggravated filming a person engaged in a private act	5	[17-543]
s 91L(1)	Filming a person's private parts	100 penalty units or 2 years or both	[17-543]
s 91L(3)	Aggravated filming a person's private parts	5	[17-543]

*SNPP: Standard non-parole period

The offences in Table 1, with the exception of those created under s 73, reflect the fact that the *Crimes Amendment (Sexual Offences) Act* 2003 standardised the age of consent for both males and females at 16 years. Section 77 explicitly states that consent is not a defence to a charge under ss 61M(2), 61N(1), 61O(1), 61O(2), 61O(2A), 66A(1), 66A(2), 66B, 66C, 66D, 66EA, 66EB and 73, or to a charge under s 61M(1) if the victim is a child under 16 years. Consent is also not a defence to a charge under s 91D: s 91D(3).

On conviction of a person for a sexual offence against a child, the court may refer the matter to an appropriate child protection agency if the child is under the authority of the offender: s 80AA.

[17-430] Standard non-parole periods

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 introduced standard non-parole periods, as detailed in Table 1 at [17-420].

The effect of the introduction of standard non-parole periods will generally be an upward movement in the length of sentences for offences to which they apply: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; *R v AJP* [2004] NSWCCA 434 at [37].

See further **Move upwards in the length of non-parole periods?** at [7-990].

[17-440] Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A was inserted into the *Crimes (Sentencing Procedure) Act* in 2002 and provides a non-exhaustive list of aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence. The weight of authority indicates that Parliament intended the section to replicate the common law, rather than alter it: *R v Wickham* [2004] NSWCCA 193 at [23].

Some of the aggravating factors relevant to child sexual assault in s 21A(2) are:

- the offender has a record of previous convictions: s 21A(2)(d)
- the offence involved gratuitous cruelty: s 21A(2)(f)

- the injury, emotional harm, loss or damage caused by the offence is substantial: s 21A(2)(g)
- the offender abuses a position of trust or authority in relation to the victim: s 21A(2)(k)
- the victim is vulnerable, for example, because the victim is very young or has a disability: s 21A(2)(l)
- the offence involves multiple victims or a series of criminal acts: s 21A(2)(m)
- the offence was part of a planned or organised criminal activity: s 21A(2)(n).

Application of these subsections are discussed in **Section 21A factors "in addition to" any Act or Rule of Law** at [11-060]ff.

The aggravating factor in s 21A(2)(n) — the offence was part of a planned or organised criminal activity — was considered by the court in *Saddler v R* [2009] NSWCCA 83. The applicant who had downloaded more than 45,000 images and 700 movies from the internet, and stored them on external hard drives, CDs and a laptop, was sentenced for possessing child pornography contrary to s 91H(3) *Crimes Act* 1900 (repealed). These circumstances, however, could not be properly regarded as constituting "planned or organised" criminal activity for the purpose of aggravating the offence under s 21A(2)(n): at [32]. In particular, there was no evidence of planning, or none that went beyond that which is inherent in the offence: at [36].

The court in *Saddler v R* also considered the aggravating factor in s 21A(2)(f) — the offence involved gratuitous cruelty. At that time, child pornography was defined by s 91H(1) *Crimes Act* 1900 to include the element, "torture, cruelty or physical abuse" (the definition, which still includes that phrase, is now contained in s 91FB(1)(a) and child pornography material is now referred to as "child abuse material"). The sentencing judge found that this aspect of the definition of child pornography was present and had taken it into account in determining the objective gravity of the offence. Taking it into account again under s 21A(2)(f) would be impermissible double counting: at [41]. Further, although there is no direct authority on the question of whether the possession of images after they had been created "involved" gratuitous cruelty, it was likely that it would not. Some involvement of the applicant in the creation of the images is required: at [43].

[17-450] De Simoni principle

The court must disregard a matter of aggravation if taking it into account leads to punishing an offender for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when a basic form of the offence is charged and the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act* 1900; such as, the offence was committed in company (*R v Newham* [2005] NSWCCA 325), the offender used a weapon, or the offender was in a position of trust: *R v Wickham* at [26]. See also **Fact finding at sentence** at [1-500].

[17-460] Victim impact statements

For the use of victim impact statements, see **Victims and victim impact statements** at [12-800].

[17-480] Sexual intercourse — child under ten: s 66A

For a detailed discussion of the offence and applicable principles, see P Poletti, P Mizzi and H Donnelly, "Sentencing for the offence of sexual intercourse with a child under 10", *Sentencing Trends & Issues*, No 44, Judicial Commission of NSW, 2015.

The current form of the offence under s 66A *Crimes Act* 1900, as implemented by the *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 (commenced upon assent on 29 June 2015) provides that any "person who has sexual intercourse with a child who is under the age of 10 years is guilty of an offence". The amendments represent a reversion to a single form of the offence which existed prior to the *Crimes Amendment (Sexual Offences) Act* 2008. A maximum penalty of life imprisonment (previously applicable only to the aggravated form of the offence) applies to the new offence. The standard non-parole period of 15 years continues to apply.

For offences committed between 1 January 2009 and 29 June 2015, the following maximums apply:

- s 66A(1): sexual intercourse with a child under 10 (maximum penalty of 25 years)
- s 66A(2): sexual intercourse with a child under 10 in circumstances of aggravation (maximum penalty of life imprisonment).

A standard non-parole period of 15 years applied to either form of the offence. Subsections 66A(3)(a)–(h) provided that the circumstances of aggravation included when an offender:

- intentionally or recklessly inflicted actual bodily harm on the child
- threatened to inflict actual bodily harm on the child or a person who is present or nearby
- committed the offence in company
- committed the offence on a child under his or her authority
- committed the offence on a child with a serious physical disability
- committed the offence on a child with a cognitive impairment
- took advantage of a child who was under the influence of alcohol or drugs
- deprived the child of his or her liberty, either before or after the commission of the offence, or
- committed the offence of break and enter into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Specific guidance on the factors relevant to assessing the objective seriousness for an offence under s 66A *Crimes Act* 1900 has been provided by the Court of Criminal Appeal: *R v AJP* [2004] NSWCCA 434 at [25], *MLP v R* [2006] NSWCCA 271 at [22], *R v PGM* [2008] NSWCCA 172. These factors include how the offences took place, over what period, with what degree of coercion, the use of threats or pressure, and any immediate effect on the victim. However, caution should be exercised where these cases discuss assessing these factors by reference to being below or above a midpoint: *Muldrock v The Queen* (2011) 244 CLR 120. See **Consideration of standard non-parole period in sentencing** at [7-920].

See also **Sexual assault** at [20-630]ff.

Attempting or assaulting with intent to have sexual intercourse with child under 10: s 66B

In *R v McQueeney* [2005] NSWCCA 168, the offender committed two counts of attempted sexual intercourse with a child under 10 years and was sentenced to a non-parole period of 7 years and a balance of term of 3 years. The court found that the sentencing judge did not offend the principles for an attempted offence. Justice Latham, Howie and Grove JJ agreeing, stated at [25]–[26]:

> [H]is Honour was dealing with the applicant for an attempt rather than the substantive offence. The approach to sentencing for an attempted substantive offence was expressed by this court in *Taouk* [1992] A Crim R 387 as follows:
>
> > "There is clearly an interrelationship between the seriousness of the intended consequences and the real prospects of having achieved them and that relationship has to be weighed in each case in the light of all the circumstances."
>
> In those circumstances his Honour's evaluation of the objective gravity of the offence required his Honour to consider that the substantive offence was not completed and the prospect that the attempt, if not interrupted, would have succeeded. On the facts before him his Honour was entitled to conclude that the substantive offence may well have succeeded but for the fact that the complainant awoke. The applicant had progressed a considerable way towards actual penetration. The boy's underwear had been removed and the applicant was holding the boy by the shoulders. The applicant was actively engaged in the attempt. Given these features of the offence and the gravity of the offence which was attempted, I am not persuaded that his Honour imposed a sentence in respect of this offence which was outside the range of his sentencing discretion. It may well be regarded as a sentence towards the top of the range, but that is insufficient to attract the intervention of this court.

Where committed on or after 29 June 2015, the offence is subject to a standard non-parole period of 10 years.

[17-490] Sexual intercourse — child between 10 and 16: s 66C

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted a new circumstance of aggravation for the aggravated form of this offence — where an offender deprives a child of his or her liberty for a period before or after the commission of the offence: s 66C(5)(h).

The courts have repeatedly emphasised the extremely serious view that has to be taken towards matters of this kind: *R v JVP* (unrep, 6/11/95, NSWCCA). In the early 1990s it was held that the ages of victims and the range of criminality of the offenders may vary greatly, rendering a wide range of sentences appropriate, including periodic detention (then available as a sentencing option, but now replaced by intensive correction orders): *R v Agnew* (unrep, 6/12/90, NSWCCA) per Loveday J; *R v McClymont* (unrep, 17/12/92, NSWCCA) per Gleeson CJ.

The most significant matter which determines where a particular offence is to be placed in the spectrum of offences of this kind is the degree to which the offender is seen to have exploited the youth of the victim: *R v Sea* (unrep, 13/8/90, NSWCCA) per Badgery-Parker J at 4.

In *R v KNL* [2005] NSWCCA 260 at [42]–[43], Latham J, Brownie AJA and Buddin J agreeing, stated:

> It is trite to observe that sexual intercourse with a child of 12, knowing the child's age, is objectively more serious than sexual intercourse with a child of 12, in ignorance of the child's true age. However, it is also the case that, in terms of the position occupied by a given offence on the spectrum of offences of this kind, the younger the child, the more serious the offence; *R v T* (1990) 47 A Crim R 29.
>
> The complainant was just over 12 years of age. She was closer to ten than she was to 16, yet that feature of the offence was largely disregarded, in favour of the mitigation constituted by the respondent's mistaken belief as to her age.

Whether a complainant is a willing participant, notwithstanding his or her age, is relevant to the level of objective seriousness of a s 66C offence: *Wakeling v R* [2016] NSWCCA 33 at [47], [49]; *Hogan v R* [2008] NSWCCA 150 at [77].

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for offences, inter alia, contrary to ss 66C(1), 66C(2) and 66C(4), committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420].

[17-500] Persistent sexual abuse of child: s 66EA

Section 66EA(1) *Crimes Act* 1900 provides that a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a "sexual offence", is liable to imprisonment for 25 years. "Sexual offence" is defined to include, inter alia, the offences encompassed by ss 61I–61O *Crimes Act* 1900. The offence was created in 1998 to overcome the problems of proving particulars (time, date and place) following the decision of the High Court in *S v The Queen* (1989) 168 CLR 266. McClellan CJ at CL said with support in *R v Langbein* [2008] NSWCCA 38 at [115]:

> The offence of persistent sexual abuse contrary to s 66EA carries a maximum prison term of 25 years. It is a more serious offence than the offences which comprise the individual acts.

Fact finding following a guilty verdict

It had been held that if a jury returns a guilty verdict to a s 66EA offence, the judge must consider which of the foundational offences are established beyond reasonable doubt so as to sentence in accordance with the verdict: *ARS v R* [2011] NSWCCA 266 at [230]. This was said to be consistent with the duty of the judge to determine the facts relevant on sentence: *ARS v R* at [233] citing *R v Isaacs* (1997) 41 NSWLR 374 at 378; *Cheung v The Queen* (2001) 209 CLR 1 at [4]–[8], [161]–[166]. This approach has been questioned in *Chiro v The Queen* [2017] HCA 37 where the court analysed a materially similar South Australian provision to s 66EA. The court held that *Cheung v The Queen* does not stand as authority for the proposition that questions should not be asked of a jury (as to which of the acts the Crown had proved) and further *Cheung v The Queen* did not concern a persistent abuse offence. Kiefel CJ, Keane and Nettle JJ at [52] said:

> … where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child contrary to s 50(1) and the judge does not or cannot get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender will have to be sentenced on the basis most favourable to the offender.

Bell J agreed, at [67], that "the exercise of discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved". It was not open for the sentencing judge to sentence the appellant on the basis that he had committed all the acts charged. Her Honour held, at [72], that such an approach was contrary to the *De Simoni* principle. See also the plurality at [44].

When an offender is sentenced for an offence under s 66EA, the question for the sentencing judge is where the offence should lie on the statutory scale, bearing in mind that the statutory maximum is 25 years imprisonment: *R v Fitzgerald* (2004) 59 NSWLR 493. It is not logical to approach the sentencing task by considering what sentences the individual offences (such as ss 61J, 61M, 61N) would have attracted had they been charged as isolated offences.

There is nothing to suggest that Parliament intended sentencing for a course of conduct that had crystallised into a s 66EA conviction to be more harsh than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences: *R v Manners* [2004] NSWCCA 181 at [21]. Section 66EA is capable of applying to a wide range of conduct constituting sexual offences against children: *Manners* at [34].

Where the offences constituting the s 66EA charge are three or more representative charges (that is, they are not isolated incidents but part of a course of conduct), s 66EA does not permit a departure from the common law approach taken to sentencing for representative counts: *ARS v R* at [226]. The sentencing judge can still sentence on the basis that the offences were not isolated incidents but the uncharged offences cannot be used to increase the punishment: *R v Fitzgerald* (2004) 59 NSWLR 493 at [13]; *ARS v R* at [226].

In *Hitchen v R* [2010] NSWCCA 77 at [24], although allowing a severity appeal against an aggregate sentence of 25 years with a non-parole period of 18 years, the court accepted the sentencing judge's finding that the criminality involved for the offence of persistent child abuse was in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**); see also *Hitchen v R* at [11]–[14].

[17-505] Aggravated sexual assault: s 61J

The offence of aggravated sexual assault under s 61J *Crimes Act* 1900 carries a maximum penalty of 20 years with a standard non-parole period of 10 years. The effect of s 61J(2) is to create an offence with a circumstance of aggravation where the victim was:

- under the age of 16 years: s 61J(2)(d)
- under the authority of the offender: s 61J(2)(e).

See for example, *Fisher v R* [2008] NSWCCA 129 (13-year-old victim) and *R v BWS* [2007] NSWCCA 59 (16-year-old victim). In *Rylands v R* [2008] NSWCCA 106, the victim was aged 15 years and 9 months. The offence comprised an act of cunnilingus. The court noted that crimes of this nature are regarded with great seriousness and that general deterrence and retribution require earnest consideration: at [98].

[17-510] Aggravated indecent assault: s 61M

As to the approach to sentencing for indecent assault committed many years earlier, see **Sentencing for offences committed many years earlier** at [17-410] and *PWB v R* [2011] NSWCCA 84.

RS Hulme J said in *BT v R* [2010] NSWCCA 267 at [41]:

> Sentencing for offences under s 61M is difficult because of the absurd relativity between the 7 years maximum term and the very high standard non-parole period of 5 years for a case in the mid-range of objective seriousness. If the proportions envisaged by s 44 of the *Crimes (Sentencing Procedure) Act* were adhered to, such a non-parole period would be appropriate for a head sentence of 6 years and 8 months, a sentence that in accordance with long-standing sentencing principles would be imposed only for an offence falling very close to a worst case of an offence under s 61M.

Prior to *BT* the court had described the ratio of the standard non-parole period to maximum penalty for indecent assault as "somewhat curious and inconsistent": *R v Dagwell* [2006] NSWCCA 98 per Howie J at [38].

The *Crimes Amendment (Sexual Offences) Act* 2008 amended s 61M *Crimes Act* 1900 to increase the maximum penalty for an aggravated indecent assault against a child aged under 16 years from 7 to 10 years imprisonment (effective 1 January 2009): s 61M(2).

An offender who commits an aggravated indecent assault against a victim who is under the authority of the offender is liable to 7 years imprisonment: s 61M(1).

Although it is difficult to reconcile, the court must give attention to the standard non-parole period: *Corby v R* [2010] NSWCCA 146 at [71].

The prescription of a standard non-parole period for indecent assault does not displace the principle that the court is to have regard to the fact that the offence could have been disposed of in the Local Court: *Bonwick v R* [2010] NSWCCA 177 at [47]. Davies J said at [48]: "It will have a greater influence in the sentencing as both the objective criminality falls below the mid-range, and as the subjective criminality of the offender assumes more significance".

Worst cases

In *R v Campbell* [2005] NSWCCA 125 at [31], the court held that the sentencing judge was correct in finding that the criminality of the offences committed by the applicant was within the worst category of the range of possible offences for aggravated indecent assault under s 61M(1).

See generally the discussion at [10-005] **Cases that attract the maximum**.

Section 61M(2)

It is of considerable significance when assessing the objective seriousness of indecent assaults against children to consider the actual character of the assault, including the degree of physical contact involved: *R v PGM* (2008) 187 A Crim R 152 at [31], applying *G A T v R* [2007] NSWCCA 208 at [22]; *Corby v R* [2010] NSWCCA 146 at [71].

In *R v PGM*, the degree of genital connection in two of the s 61M(2) counts, and the gross indecency involved in the other, meant that the judge's characterisation of the

offending as at the lower end of mid-range was indicative of error: at [31], [40]. By way of contrast, where an indecent assault involved the kissing and cuddling of a child the offender believed, unreasonably, was over 16, the court said that in the particular circumstances this "was not deeply intrusive" and that the offence fell "towards the bottom of the range of objective seriousness": *Corby v R* [2010] NSWCCA 146 at [72], [78], [81]. The age difference (39 to 14 years in *Corby*) can also aggravate the offence: *Corby v R* at [77]. Other factors relevant to the assessment of objective seriousness include the specific age of the child within the range of 10–16 years, the duration of the conduct and any use of coercion: *BT v R* [2010] NSWCCA 267 at [22]–[24]; *R v KNL* [2005] NSWCCA 260 at [42]–[43]; *R v AJP* (2004) 150 A Crim R 575 at [25]. An absence of any threats "may have much less, and perhaps little, weight" in the context of offences by persons in positions of authority over their victims than in the case of offenders not in such a position: *BT v R* [2010] NSWCCA 267 at [24] per RS Hulme J referring to *R v Woods* [2009] NSWCCA 55 at [52]-[53].

See discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act 1999* at [17-570].

Further appeal cases are accessible in the SNPP Appeals component of JIRS.

[17-520] Act of indecency: s 61N

Table 1 at [17-420] sets out the maximum penalties applicable to acts of indecency committed against persons under 16 years: s 61N(1) *Crimes Act* 1900, and against persons 16 years and above: s 61N(2).

While, ordinarily, a custodial sentence would be appropriate for indecent assaults, such a sentence is neither necessarily required nor inevitable in every case: *R v O'Sullivan* (unrep, 20/10/89, NSWCCA) at 4–5. However, the legislature does expect the courts to punish severely those who commit sexual assaults on young children: *R v Muldoon* (unrep, 13/12/90, NSWCCA) at 6. For example, periodic detention, when it was available as a sentencing option (prior to 1 October 2010), was said not to be appropriate where the offences occurred over a long period of time on young children: *R v Burchell* (unrep, 9/4/87, NSWCCA).

The Court of Criminal Appeal has declined to lay down a requirement that a custodial sentence should ordinarily be imposed in relation to the charge of act of indecency: *R v Baxter* (unrep, 26/5/94, NSWCCA) per Hunt CJ at CL at 11. In *R v Baxter*, the Court of Criminal Appeal emphasised the importance of looking to such considerations as the nature of the assault, the existence and extent of any penetration, the age of the victim and other features relevant to the case: *R v Barrett* (unrep, 26/7/95, NSWCCA) per Kirby ACJ at 6. In *Corby v R* [2010] NSWCCA 146 at [84], the Court of Criminal Appeal stated that if the act of indecency occurred in the physical presence of the victim this will bear on the determination of the seriousness of the offence. The seriousness of the offence escalates if the offence continues over a period of days: at [86].

Aggravated act of indecency: s 61O

Table 1 at [17-420] sets out the maximum penalties for aggravated acts of indecency offences committed against a person under 16 years: s 61O(1) *Crimes Act* 1900, 16 years or above: s 61O(1A); or under 10 years: s 61O(2). Table 1 also sets out the

maximum penalty for the offence of committing an act of indecency with or towards a person under the age of 16 years (or inciting a person under the age of 16 years to an act of indecency) knowing that the act of indecency is being filmed for the purpose of producing child abuse material (previously child pornography): s 61O(2A), inserted by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

In *R v ARC* (unrep, 28/8/96, NSWCCA), Hunt CJ at CL stated the following in relation to s 61O offences:

> … the size of the scale in relation to the acts of indecency referred to in [the] NSW *Crimes Act* is necessarily small. Section 61O provides for circumstances of aggravation … That further reduces the size of the relevant scale. Moreover, it does not take much for an act of indecency to become an indecent assault, with a correspondingly higher maximum sentence.

[17-530] Sexual intercourse with child between 16 and 18 under special care: s 73

Any person who has sexual intercourse with someone under their special care who is of or above 16 but under 17 years of age, is liable to imprisonment for 8 years. Where the victim is of or above the age of 17 years and under the age of 18 years, the offender is liable to imprisonment for 4 years: s 73(2) *Crimes Act* 1900. "Under the special care of another person", for the purposes of s 73, is defined in s 73(3).

[17-535] Procuring or grooming: s 66EB

Under s 66EB(2) *Crimes Act* 1900, an adult who intentionally procures a child for unlawful sexual activity with that or any other person is guilty of an offence. The offence carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case.

In *Tector v R* [2008] NSWCCA 151, the offender was charged with using a telecommunications service to procure a 12-year-old boy to engage in sexual activity: s 474.26(1) Criminal Code (Cth). Section 474.26(1) is the Commonwealth equivalent of s 66EB(2). Like s 66EB(2)(a), it carries a maximum penalty of 15 years. The court (Hall J, Giles JA and Barr J agreeing) sentenced the offender to a head sentence of 8 years imprisonment, with a non-parole period of 5 years. The gravamen of the offence is conduct by an adult directed at a child under 16 years, undertaken with the intent of encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) that child to engage in sexual activity. "Sexual activity" is defined in s 474.28(11) (now repealed) to include "any" activity of a sexual or indecent nature and "need not involve physical contact between people": at [90]. In addition to the nature of the sexual activity proposed, the following factors were relevant to the determination of sentence at [94]:

- the offender invited the child to engage in sexual activity with him
- money was offered as an inducement to sexual activity
- the offender persistently pursued the child (over a course of approximately six weeks)
- the child, at 12 years of age, was significantly below the age of 16 years

- the extent of the age difference between the 41-year-old applicant and the 12-year-old child
- the offender took steps to remain anonymous (false name, public telephones and internet cafes).

A new offence of "meeting child following grooming" was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: ss 66EB(2A) and (2B). It carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case: s 66EB(2A). The offence involves an adult intentionally meeting a child, or travelling to meet a child, whom he or she has groomed for sexual purposes, with the intention of procuring the child for unlawful sexual activity: s 66EB(2A).

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for all offences under s 66EB, committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420].

[17-540] Child sexual servitude and prostitution

Part 3 Div 10A (ss 80B–80F) *Crimes Act* 1900 deals with offences relating to sexual servitude. The aggravated form of the offence of causing sexual servitude applies to persons under the age of 18 years: ss 80C(a), 80D(2). The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for the aggravated form of the offence from 19 to 20 years imprisonment (effective 1 January 2009): s 80D(2).

Part 3 Divs 15 and 15A (ss 91C–91H) of the *Crimes Act* 1900 deal with offences relating to child prostitution and child abuse/pornography material. The *Crimes Amendment (Child Pornography) Act* 2004 amended ss 91C and 91G and introduced s 91H. Significantly, the maximum penalty for offences in s 91G was doubled, increasing from 7 to 14 years where the child is under the age of 14 years, and from 5 to 10 years where the child is of or above the age of 14. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for offences under s 91E (obtaining benefit from child prostitution): see below.

Child prostitution

Promoting or engaging in acts of child prostitution: s 91D

In *R v Romano* [2004] NSWCCA 380, the applicant had been sentenced to a fixed term of 6 years on each of three counts of causing a child to participate in act of child prostitution and on each of three counts of causing a child under 14 years to participate in an act of child prostitution. The court found that, although the sentencing judge, in setting a sentence close to the maximum, erred in characterising s 91D prostitution offences as "in many ways … analogous to a violent aggravated sexual assault in terms of its effect on the community and particularly on the girl", when the offences on the Form 1 were taken into account, the sentence imposed was within the sentencing range.

For offences under s 91D(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420]), committed on or after 29 June 2015, a standard non-parole period of 6 years applies.

Obtaining benefit from child prostitution: s 91E

On each of seven counts of obtaining benefit from child prostitution under s 91E in *R v Romano* [2004] NSWCCA 380, the applicant was sentenced to a fixed term of 3 years. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for receiving money or any other material benefit knowing that it is derived from an act of prostitution involving a child under the age of 14 years from 10 to 14 years imprisonment (effective 1 January 2009): s 91E(1). The higher maximum penalty only applies where the age of the child is set out in the charge for the offence: s 91E(3).

For offences under s 91E(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420]), committed on or after 29 June 2015, a standard non-parole period of 6 years applies where the offence is one involving a child under 14, attracting the 14 year maximum penalty.

Premises not to be used for child prostitution: s 91F

In *R v Hilton* [2005] NSWCCA 317, the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) and eight counts of premises not to be used for child prostitution under s 91F(1). His defence — that he did not know the two girls were under 18 years of age — was rejected by the sentencing judge. On appeal, the submission that he was double punished for his conduct was made good: *Pearce v The Queen* (1998) 194 CLR 610 applied. There was no need to charge the applicant with offences under s 91F(1) as well as under s 91E(1); the offences under s 91F, in point of criminality, being almost entirely subsumed in the offences committed under s 91E: at [8]. Therefore, the sentence for offences under s 91E(1) was reduced for each count to a fixed term of 2 months, whereas the sentence for offences under s 91F(1) was confirmed as a 3-year-term of imprisonment with a non-parole period of 12 months. Justice Adams (with Bell and Hall JJ agreeing), stated that despite the powerful subjective circumstances of this case the objective criminality of the offences was substantial and necessitated a term of full-time custody.

[17-541] Child abuse/pornography offences

The following text sets out both Commonwealth and State offences. Increases to maximum penalties reflect the view of the State and Federal Parliament of the serious criminality involved in child pornography offences: *R v Porte* [2015] NSWCCA 174 at [57], [58]. In 2008, the maximum penalty for an offence against s 91H(2) *Crimes Act* 1900 (see below) was increased from 5 to 10 years imprisonment. In 2010, the maximum penalty for the Criminal Code (Cth), s 474.19 (see below) (and other similar offences) was increased from 10 to 15 years imprisonment.

State offences

Part 3 Div 15A *Crimes Act* 1900 contains the following State child abuse material (previously child pornography) offences:

- using a child to produce child abuse material: s 91G(1)
- producing child abuse material: s 91H(2)
- disseminating child abuse material: s 91H(2)
- possessing child abuse material: s 91H(2).

"Child abuse material" is defined in s 91FB as material which:

> … depicts or describes in a way that reasonable persons would regard as being, in all the circumstances, offensive:
>
> (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
>
> (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
>
> (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
>
> (d) the private parts of a person who is, appears to be or is implied to be, a child.

Commonwealth offences

Chapter 10 Pts 10.5 and 10.6 Criminal Code (Cth) contain the following Commonwealth child pornography and child abuse material offences:

- using a postal service for child pornography or child abuse material: ss 471.16, 471.19 (maximum penalty of 15 years)
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use through a postal or similar service: ss 471.17, 471.20 (maximum penalty of 15 years)
- using a carriage service to access, transmit (or cause to be transmitted to himself or herself), make available, publish, distribute, advertise, promote or solicit child pornography or child abuse material: ss 474.19, 474.22 (maximum penalty of 15 years). See **Special Bulletin 11 — DPP (Cth) and DPP (Vic) v Garside [2016] VSCA 74**, which reviewed the leading authorities in NSW and Victoria.
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use by the offender or another person to commit an offence against ss 474.19 and 474.22: ss 474.20, 474.23 (maximum penalty of 15 years).

An aggravated form of each offence is contained in ss 471.22 and 474.24A Criminal Code (Cth) (maximum penalty of 25 years). It is also an offence for an internet service provider or internet content host who is aware that a service they provide can be used to access material they believe, on reasonable grounds, is either child pornography or child abuse material to not refer details of that material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material: s 474.25 (maximum penalty of 100 penalty units, that is, $18,000).

There is also an offence of importing or exporting child pornography or child abuse material: s 233BAB *Customs Act* 1901 (Cth) (maximum penalty of 10 years).

Mixture of State and Commonwealth offences

It is apparent that there is a degree of overlap between some of the Commonwealth and State offences. In *R v Cheung* [2010] NSWCCA 244 at [131], the court said that it was open to a sentencing court to seek guidance from the sentences in respect of much longer established identical state offences. Although these comments were made in the context of drug offences, the statement of principle should apply regardless of the offence. See further discussion in **Sentencing Commonwealth offenders** at [16-002].

A combination of Commonwealth and State offences is not uncommon in a child pornography matter: *R v Porte* at [55]. Although the offences overlap, they are not identical. Commonwealth offences focus on the internet and the role it plays as the heart of the child pornography industry, whereas State offences are not concerned with the means by which the offender gains possession of the material: *R v Porte* at [56]; *R v Fulop* [2009] VSCA 296 at [11]–[12].

For a detailed discussion of the sentencing principles which apply in relation to sentencing for such offences see P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph 34, Judicial Commission of NSW, 2010. As a general rule, the same sentencing principles apply regardless of whether the court is dealing with a State or Commonwealth offence.

Sentencing principles

General deterrence

General deterrence is a paramount consideration for offences involving child abuse/child pornography material. In *R v Booth* [2009] NSWCCA 89 at [40]–[44], Simpson J said:

> possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime.
>
> In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> It is for that reason that this is a crime in respect of which general deterrence is of particular significance. In my opinion the sentencing judge too readily dismissed from consideration the need to convey the very serious manner in which courts view possession of child pornography.

In *R v Gent* [2005] NSWCCA 370 at [43], where the applicant was charged with importing child pornography under s 233BAB(5) *Customs Act* and sentenced to 18 months imprisonment with a non-parole period of 12 months, the Crown relied upon the statement of Morden ACJO in the Ontario Court of Appeal in *R v Stroempl* (1995) 105 CCC (3d) 187 at 191 to the following effect:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense, possessors such as the appellant instigate the production and distribution of child pornography — and the

> production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of the prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

This passage has been applied in Australia in *R v Jones* (1999) 108 A Crim R 50 at 51, a decision referred to by Malcolm CJ in *R v Assheton* (2002) 132 A Crim R 237 and Williams JA and MacKenzie J in *R v Cook* [2004] QCA 469.

Prior good character

In dismissing the severity appeal, the court in *R v Gent* (McClellan CJ at CL, Adams and Johnson JJ) found that the sentencing judge did not err in giving limited weight to the applicant's prior good character. General deterrence remains the "paramount consideration": at [64], [100].

In *Mouscas v R* [2008] NSWCCA 181 at [37], the court held that as the offence of possessing child pornography is frequently committed by persons of prior good character and since general deterrence is necessarily important, it is legitimate for a court to give less weight to good character as a mitigating factor. This aspect of Price J's judgment was endorsed in *DPP (Cth) v D'Alessandro* [2010] VSCA 60 in relation to Commonwealth offences. See the discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act* at [17-570]. See also *R v Elliot* [2008] NSWDC 238 at [57]; *Police v Power* [2007] NSWLC 1.

Assessing the objective seriousness generally

Assessing the objective seriousness of a particular offence involving child abuse or child pornography material offence is the most significant aspect of the sentencing exercise. In *Minehan v R* (2010) 201 A Crim R 243 at [94], the Court of Criminal Appeal identified the following factors as being relevant to an assessment of the objective seriousness of a range of offences including, possessing, disseminating and transmitting child pornography:

1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material — in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in *The Queen v De Simoni* (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.

9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. Whether the offender acted alone or in a collaborative network of like-minded persons.
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in s 21A(2) or (3) *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A *Crimes Act* 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.

In *R v Porte* [2015] NSWCCA 174 at [63]–[64], the court said the sentencing principles set out in *Minehan v R* remain relevant and have been applied in numerous decisions including: *R v Linardon* [2014] NSWCCA 247; *R v Martin* [2014] NSWCCA 283; *James v R* [2015] NSWCCA 97. The court added to these principles the following considerations:

- The absence of an intention to sell or distribute child abuse material does not mitigate penalty for a possession offence: *R v Porte* at [66]; *Saddler v R* [2009] NSWCCA 83 at [49]–[50]; *R v Booth* [2009] NSWCCA 89 at [46].
- The possession of child abuse material is not a victimless crime. Those who possess such material help to create a market for the continued exploitation and abuse of children. It is for that reason that general deterrence is of particular significance: *R v Porte* at [68]–[70]; *R v Booth* at [41]–[42].
- Evidence of rehabilitation, while an important sentencing consideration under s 16A(2)(n) *Crimes Act* 1914 (Cth) and s 21A(3)(h) *Crimes (Sentencing Procedure) Act* 1999, may have reduced significance given the predominance of general deterrence and denunciation in the sentencing process for these offences: *R v Porte* at [71]–[72]; *R v Booth* at [47].

R v Porte was applied in *R v De Leeuw* [2015] NSWCCA 183 at [70]. See also *Lyons v R* [2017] NSWCCA 204 at [76].

The use of scales, such as the CETS (Child Exploitation Tracking System) scale, to categorise the material is a helpful way to assist a sentencing court in assessing the objective seriousness of the offence: *R v Porte* at [75]. It is of further assistance to provide random sample evidence of the material to the court so that it has before it something more than a formulaic classification which may not communicate the true nature of the material: *R v Porte* at [77], [114]. Such evidence is permitted under s 289B *Criminal Procedure Act* 1986.

Other factors of universal application which must be considered when sentencing for these offences include: the offender's motivation; the way in which the material is organised; whether the charges are representative; evidence concerning the surrounding circumstances and the proper application of the *De Simoni* principle; and issues related to totality: see further P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph 34, Judicial Commission of NSW, Sydney, 2010. The court in *R v Porte* at [62] described the monograph as a helpful publication.

Specific offences

Children not to be used for production of child abuse material: s 91G(1) Crimes Act 1900

A person commits an offence under s 91G if they use a child for the production of child abuse material, cause or procure a child to be so used, or consents to a child in their care being so used. The wording of this section was amended by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The phrase, "for pornographic purposes" was replaced by "for the production of child abuse material". Offences contrary to s 91G(1) committed on or after 29 June 2015 attract a standard non-parole period of 6 years.

In *R v Pearson* [2005] NSWCCA 116, on the charge of using a child under 14 years for pornographic purposes, the applicant was sentenced to a fixed term of 18 months. Although the court found that in sentencing the applicant for that offence the sentencing judge contravened s 21A(2) *Crimes (Sentencing Procedure) Act* by taking into account, as a circumstance of aggravation, that the complainant was under the age of 14, notwithstanding the error, the sentences imposed on the applicant were not found to be manifestly excessive.

In *Hitchen v R* [2010] NSWCCA 77, the applicant was charged with a number of child pornography offences including one against s 91G(1)(a) which was accepted as a "worst category" case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**): *Hitchen v R* at [11], [24]. That offence involved the applicant using his 7-year-old step-daughter on nine separate occasions for the purpose of photographing and videoing her in erotic postures which the sentencing judge described as "disgusting and degrading": *Hitchen v R* at [15]. The applicant was sentenced to a non-parole period of 2 years with a balance of term of 4 years for this offence (the total effective sentence was 18 years with a non-parole period of 14 years).

Production, dissemination or possession of child abuse material: s 91H Crimes Act 1900

A new form of s 91H was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The new section uses the phrase "child abuse material" rather than "child pornography".

The maximum penalty for the possession offence under the previous form of s 91H was increased from 5 to 10 years imprisonment, and the previous production, dissemination and possession offences were merged into s 91H(2): *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

"Child abuse material" includes material that "appears to be or is implied to be" a child: as a victim of torture, cruelty or physical abuse; engaged in a sexual pose or sexual activity; or in the presence of a person who is engaged in a sexual pose or sexual activity or: s 91FB(1).

The fact that no actual children are used in the production of offending material is a relevant matter in the assessment of objective seriousness: *Minehan v R* [2010] NSWCCA 140 at [90]. In *Whiley v R* [2010] NSWCCA 53, the images the subject of the charge were drawn by the applicant and did not involve the actual abuse of children. This, together with the small number of images produced and the fact that the

offender produced them for his own gratification, justified a finding that the offence fell within the low range: at [55]–[71]. In *R v Jarrold* [2010] NSWCCA 69, the production offences involved internet conversations with others concerning sexual activity between the respondent and children. An argument that the offences should be treated as less serious because they were a result of fantasy was strongly rejected: at [53]. The court did accept that, although the offences were separate and distinct, and two related to ongoing criminal activity, they otherwise fell towards the bottom of the range: at [55].

Accessing, transmitting and making available child pornography or child abuse material: ss 474.19 and 474.22 Criminal Code (Cth)

In *James v R* [2009] NSWCCA 62 at [16], the court separately determined the seriousness of an offence of accessing child pornography and an offence of possession of such material, noting that the access offence continued over a shorter period of time than the possession offence which had continued for a period of over 3 years.

In offences involving the transmission and making available of child pornography or child abuse material, the degree of sophistication and technical skill in the use of the internet is relevant to a determination of the objective seriousness of the offence. In *R v Mara* (2009) [2009] QCA 208 at [10], [37], the court concluded that such sophistication and skill was an aggravating factor. In *R v Talbot* [2009] TASSC 107 at [9], the fact material was made available using two file sharing programs and was encrypted, thus making detection more difficult, justified a finding that the offences fell within the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**).

See the discussion of factors which might bear on an assessment of the objective seriousness of these types of offences referred to in *Minehan v R* [2010] NSWCCA 140 at [94] discussed above.

[17-543] Voyeurism and related offences

New voyeurism and related offences were inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: Pt 3 Div 15B (ss 91I–91M) (effective 1 January 2009). The maximum penalties for these offences are detailed in Table 1 at [17-420].

Voyeurism: s 91J

Voyeurism is the seeking of sexual arousal or gratification by observing another person engaged in a private act without the consent of the person and knowing that the other person has not consented to be observed for that purpose: s 91J(1). "Engaged in a private act" is defined in s 91I(2). An offence against s 91J(1) is a summary offence: s 91J(2).

An aggravated form of the offence is committed when the person observed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose facilitating the commission of the offence: s 91J(3), (4).

Filming a person engaged in a private act: s 91K

It is an offence for a person to seek sexual arousal or gratification (or enable another person to do so) by filming another person engaged in a private act without the consent

of the person and knowing that the person being filmed has not consented to being filmed for that purpose: s 91K(1). An aggravated form of the offence is committed if the person being filmed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence: s 91K(3), (4).

Filming a person's private parts: s 91L

It is an offence for a person to seek sexual arousal or gratification (or seek to enable another person to do so) by filming another person's private parts without the consent of the person and knowing that the person being filmed does not consent to being filmed for that purpose: s 91L(1). An offence against s 91L(1) is a summary offence. An aggravated form of the offence is committed if the person filmed was under 16 years of age or the offender constructed or adapted the fabric of a building for the purpose of facilitating the commission of the offence: s 91L(3), (4).

[17-545] Incitement to commit a sexual offence

An offence of inciting a person to commit a sexual offence was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009): s 80G. Inciting a person to commit a sexual offence carries the penalty provided for the commission of the sexual offence: s 80G(1).

[17-550] Intensive correction order not available for a "prescribed sexual offence"

Section 66 *Crimes (Sentencing Procedure) Act* provides that an intensive correction order may not be made in respect of a sentence of imprisonment for an offence under Div 10 or 10A of Pt 3 *Crimes Act* 1900.

For a further discussion of restrictions on the power to make intensive correction orders see **Intensive correction orders (ICOs)** at [3-630].

[17-560] Other aggravating circumstances

Breach of trust

It is an obvious aggravating feature if the offender was in a position of trust and violated that trust by sexually assaulting the child: *R v Muldoon* (unrep, 13/12/90, NSWCCA). There is a variety of situations where breach of trust has been recognised.

Family members

The abuse of trust is considered more serious where the offender is the father (or family member) of the victim. Sentences must be of a severe nature and little leniency can be given, even though the parent has been otherwise of good character: *R v Evans* (unrep, 24/3/88, NSWCCA); *R v Welcher* (unrep, 9/11/90, NSWCCA) per Lee CJ at CL at [15]; *R v Bamford* (unrep, 23/7/91, NSWCCA). In *R v Hudson* (unrep, 30/7/98, NSWCCA) at 2, Sully and Ireland JJ, Spigelman CJ agreeing, stated:

> children in a family situation are virtually helpless against sexual attack by the male parent and … children have a right to be protected from sexual molestation within the family and … this can only be achieved by the courts imposing sentences of a salutary nature.

The Court of Criminal Appeal has expressed particular concern that in family situations children are required to obey their parents. The offender exploits that authority and their power to discipline the child: *R v JVP* (unrep, 6/11/95, NSWCCA); *R v RKB* (unrep, 30/6/92, NSWCCA). In *R v BJW* (2000) 112 A Crim R 1 at [20]–[21], Sheller JA stated:

> [A] child aged 13 or younger is virtually helpless in the family unit when sexually abused by a step-parent. All too often the child is afraid to inform upon the step-parent; see generally *R v Bamford* (unreported) CCA, 23 July 1991 per Lee CJ at CL at 5. The younger the victim the more serious is the criminality; see *R v PWH* (unreported) CCA, 20 February 1992.

Teachers, coaches and group leaders

In *R v King* (unrep, 20/8/91, NSWCCA), the respondent was a leader in a junior athletics organisation. In allowing the Crown appeal the court increased his sentence from a 2-year periodic detention order to a fixed term of 2 years.

In *R v MacDonnell* (unrep, 8/12/95, NSWCCA), the respondent was the head teacher at the victim's school. On the charge of carnal knowledge under s 73 he was sentenced to a minimum term of 6 months with an additional term of 2 years.

In *R v Lumsden* (unrep, 31/7/96, NSWCCA), the applicant was the victim's swimming coach. The court found that the sentencing judge did not err in finding that the breach of trust arising from a coach and pupil relationship aggravated the circumstances of the child sexual assault offences.

Carers

In *R v Eagles* (unrep, 16/12/93, NSWCCA), the applicant was a baby sitter. On multiple charges of homosexual child abuse he was sentenced to a minimum term of 7 years with an additional term of 3 years.

Priests

In *Ryan v The Queen* (2001) 206 CLR 267, the applicant was a priest who abused his position of trust by sexually assaulting young boys over an extended period of time.

Homeless children

In *R v Fisk* (unrep, 21/7/98, NSWCCA), the applicant was charged with 24 separate counts of serious sexual misconduct against three victims. In confirming the aggregate sentence of a minimum term of 9 years with an additional term of 3 years, the court found that the applicant's behaviour in manipulating, exploiting and taking advantage of the boys' dysfunctional family backgrounds and homeless state, was a further aggravating factor.

Multiple assaults

Merely that the offences occurred in the course of a single extended episode does not justify the conclusion that the sentences are to be wholly concurrent: *R v Dunn* [2004] NSWCCA 41 at [50]. In *Carlton v The Queen* [2008] NSWCCA 244 at [122], the court held that there should have been at least partial accumulation of the sentences notwithstanding that they occurred as part of one episode. The imposition of totally

concurrent sentences failed to acknowledge the separate harm done to the victim by the different acts of the appellant: at [122]. This was an occasion where consideration of an offender's behaviour being closely related in time should not have obscured the fact that different offences were committed: at [122].

In child sexual assault cases where there are multiple assaults occurring as part of a background of continuous abuse, the fact that these offences are not isolated events is a material consideration in sentencing: *R v Bamford* (unrep, 23/7/91, NSWCCA). In *Dousha v R* [2008] NSWCCA 263 at [27]:

> I am satisfied that her Honour's finding that the counts were representative of a course of conduct was in order to emphasise the distinction between the leniency that might be extended for an isolated instance of misconduct as distinct from repeated and discrete misconduct.

Offences involving a number of victims or a large number of instances which occurred over a long period of time have been regarded as demonstrative of cases involving a very high degree of criminality: see *R v Hill* (unrep, 7/7/92, NSWCCA). Condign punishment is called for where grave and repeated sexual assaults are perpetrated upon young children, particularly by a person in a position of trust and authority: *R v JCW* [2000] NSWCCA 209 per Spigelman J at [121]. However, each case must be necessarily understood upon its own facts and by reference to the particular objective circumstances. Such consideration would necessarily include the number of victims involved, the duration of the offence(s) and the extent of sexual invasion seen: *R v Davis* [1999] NSWCCA 15 at [65].

Caution must be exercised when a criminal escapade involves consequences for more than one victim. In these circumstances, there is a special need to ensure that by imposing concurrent sentences, insufficient recognition is not given to the fact that more than one victim has been impacted by the criminal activity: *R v AB* [2005] NSWCCA 360.

In *R v Wicks* [2005] NSWCCA 409 at [49], McClellan CJ at CL stated:

> Persons who set about committing crimes of a sexual nature upon a number of different victims, even if the offence occurs in a short space of time can expect a penalty which imposes a prison term which will be served separately for at least some of the offences (… see the discussion about multiple victims in *R v Dunn* [2004] NSWCCA 41 at [50], *R v AB & Clifford* [2005] NSWCCA 360 at [90]–[84], *R v Weldon* (2002) 136 A Crim R 55 at 62 per Ipp J).

In *R v Katon* [2008] NSWCCA 228 at [41], the court, applying *R v Knight* (2005) 155 A Crim R 252 per Johnson J at [112], held that:

> The facts relating to the various offences disclose a course of serious criminal conduct over a number of years. That conduct involved the sexual abuse of 3 individual victims. In the ordinary course there should be a recognition of that separate offending by at least partial accumulation of the sentences …

In *Dousha v R* [2008] NSWCCA 263 at [57], a case involving discrete offending against two young children over a period of years, the court held that there was no error manifested in the fact that the sentences were partially accumulated.

[17-570] Mitigating factors

The issue of consent

Consent is *not* a mitigating factor or defence. Children are to be protected from sexual conduct, even if they are willing participants: *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Brady* (unrep, 3/3/94, NSWCCA).

Sections 77(1) and 91D(3) *Crimes Act* 1900 provide that consent is no defence to the offences specified in those sections, as noted above at [17-420]. The judge erred in *R v Nelson* [2016] NSWCCA 130 by describing, as a factor in the respondent's favour, the offences as "consensual". "Consensual" is not a proper description; the offending may be better described as not being the subject of opposition. Lack of consent is not an element of the offences because the law deems persons of that age unable to give informed consent. While the use of threats or force would have aggravated the offending, mere lack of opposition is irrelevant and not a mitigating factor: *R v Nelson* at [23]. The age difference between the victims and the respondent was significant: *R v Nelson* at [25], [64].

Good character

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted special rules for child sexual offences: ss 21A(5A), (5B) *Crimes (Sentencing Procedure) Act* (effective 1 January 2009). Subsection 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). See further [10-410].

A new definition of "child sexual offence" was also inserted: s 21A(6). The good character amendment applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59.

Prior to the commencement of the *Crimes Amendment (Sexual Offences) Act* 2008, an offender's prior good character was held to be of less significance in child sex cases than other types of offences: *R v Rhule* (unrep, 25/7/95, NSWCCA); *R v Muldoon* (unrep, 13/12/90, NSWCCA); *R v DCM* (unrep, 26/10/93, NSWCCA); *R v Balenaivalu* (unrep, 19/2/96, NSWCCA); *R v Levi* (unrep, 15/5/97, NSWCCA); *R v C* (unrep, 24/4/97, NSWCCA) ; *R v Elliot* [2008] NSWDC 238 at [42]; *Mouscas v R* [2008] NSWCCA 181 at [37]; *R v PGM* [2008] NSWCCA 172 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

In *R v PGM* (2008) 187 A Crim R 152 at [44], the court observed that, while the judge was entitled to take the respondent's previous good character into account, to afford it "very significant weight" failed to recognise that the pattern of repeat offending extended over a period of seven months and that the relationship with the victim was deliberately fostered by the respondent for his own sexual gratification. Further, a determined and conscious course of offending diminishes the mitigating impact of a finding of good character: *R v Kennedy* [2000] NSWCCA 527 at [21]; *R v ABS* [2005] NSWCCA 255 at [25]. The fact that the respondent used child pornography when

perpetrating one of the s 61M(2) offences further indicated that his offending was "neither opportunistic nor in any meaningful contrast to his outward or public good character": *R v PGM* at [44].

Offender abused as a child

If it is established that a child sexual assault offender was sexually abused as a child, and that the history of abuse has *contributed* to the offender's own criminality, that is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty: *R v AGR* (unrep, 24/7/98, NSWCCA) at 13. However, while it is appropriate to take such a circumstance into account, it cannot be regarded as an excuse, notwithstanding the fact that such a link may aid in explaining the reason why the offender committed the offence: *R v Lett* (unrep, 27/3/95, NSWCCA) per Hunt CJ at CL at [5]; *R v Reynolds* (unrep, 7/12/98, NSWCCA) per Hulme J. Courts have to do what they can to see that the cycle of sexual abuse is broken: *R v Reynolds*.

The weight to be given to this circumstance will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge: *R v AGR* (unrep, 24/7/98, NSWCCA) at [5]. Such a consideration will usually only go to reducing the offender's moral culpability for the acts, notwithstanding that it may also be relevant to the offender's prospects of rehabilitation: *R v AGR*.

In *R v Cunningham* [2006] NSWCCA 176 at [67], the court held that the applicant's history of sexual abuse did not entitle him to mitigation because the psychiatric evidence did not go so far as to suggest that the abuse contributed to his paedophilia or the offences. Furthermore, the offences were committed in breach of a bond for similar prior offences with regard to which the applicant had already received the benefit of the history at sentence.

In *Dousha v R* [2008] NSWCCA 263 at [47], the applicant conceded that there was no direct evidence that the single instance of sexual abuse he suffered as a child had in any way contributed to his offending. Indeed, there was evidence to the contrary, as a psychologist who assessed the applicant opined that the incident did not contribute to the applicant's offending. The court held at [47] that, "[i]n the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation)", the incident was not relevant to the sentencing discretion.

Delay

Substantial delay in bringing a matter before the court in some cases may operate to the offender's advantage, for example by providing the offender with the opportunity to establish a new life and demonstrate rehabilitation. In other cases, the period of delay may lead to some constraint upon the offender's lifestyle or other detriment which may also justify a degree of leniency: *R v V* (unrep, 24/2/98, NSWCCA) per Wood J. In *R v Todd* [1982] 2 NSWLR 517 at 519, a case concerned with factors arising from consideration of offences committed interstate and resulting delays, Street CJ set down the following principle:

> where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course he comes up for sentence on subsequent occasion, and to the fact that sentencing for a

> stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

In the case of child sexual assault, it does not necessarily benefit a child sex offender that the offences are not revealed until many years after they were committed: *R v Moon* [2000] NSWCCA 534. In *R v Dennis* (unrep, 14/12/92, NSWCCA), the applicant had been charged with five counts of indecent assault and two counts of buggery after the victim came forward in 1990 following a public appeal about child abuse, and complained of offences that had occurred over the period 1974–1980. In rejecting the submission that the sentencing judge had erred by not giving adequate weight to the lapse of time between the commission of the last offence and the time when the applicant came forward for sentence, James J, Hunt CJ at CL and Carruthers J agreeing, said:

> It is not infrequently the case that sexual offences committed against a child of which only the offender and the child have knowledge, are first revealed by the child to a third person only years afterwards when the child has attained a certain level of maturity. In such cases the mere passage of time between the committing of the offences and the disclosure of the offences and the apprehension of the offender is of little weight as a factor in mitigation of penalty.

Lapse of time between the commission of the offence and notification to police should be a mitigating factor only where the delay would cause unfairness to the offender: *R v Johnson* (unrep, 16/5/97, NSWCCA) per Priestley JA. However, it is impossible to lay down any general principle as to the operation of leniency arising from delay: *R v Thomson* (unrep, 18/6/96, NSWCCA) per Levine J.

In *R v Holyoak* (1995) 82 A Crim R 502, a case involving sexual offences in which the appellant had not been charged until more than 20 years had passed and in which there had been a further six years delay before conviction; "extra curial" punishment via the media; and "hate" communications, Allen J stated:

> Whether, in any particular case, so long a delay is a detriment depends upon the circumstances of that case. There is no rule of law that it always is a detriment — although often it will be. It could be, to take a case at one extreme, that the offender has spent years in emotional hell, appalled at what he has done, terrified that the day may come when he is found out, disgraced and convicted, fearing that at any time there will be that knock on the door and never feeling free to remain so long in any community that he comes to be known and his background be of interest to others. At the other extreme the offender may have gone through the years untroubled by his offences, lacking any remorse in respect of them and feeling confident that they will never come to light because the victim never would be prepared to talk about them, his confidence increasing as the years went by with his victim remaining silent — the offender enjoying over the many years unwarranted acceptance by his associates in his respectable and stable lifestyle.

In finding that the sentencing judge made no error in principle in relation to delay, Levine J in *R v Thomson*, Priestley JA and Abadee J agreeing, applied *R v Holyoak*.

The sentencing judge had found this was not a case where there had been any dilatory conduct by the police or prosecuting authorities, nor was it a matter in which there had been charges 'hanging over' the prisoners head. As far as the applicant was concerned the matter was not going to proceed after the victim's mother refused to co-operate with the authorities in 1987. There was no evidence to the effect that the prisoner's life was in any way affected by the delay between the detection by his wife in 1987 and the eventual furnishing of evidence enabling prosecution.

The issue of delay was considered in *R v Humphries* [2004] NSWCCA 370, where Barr J, Buddin and Campbell JJ agreeing, stated that the sentencing judge was entitled to ignore the fact that there was an 11-year delay between the victim's complaint to her mother and her complaint to police and the subsequent charging of the applicant. In that case, the complainant had been discouraged from making a report by her family. Justice Barr stated at [19]–[20]:

> Although a lengthy delay between finding and charging can be taken into account in favour of an offender, there is no rule that that must happen. Each case depends on its own facts. There is no rule of law that delay is always a detriment to the offender, though it often will be: *R v Holyoak* (1995) 82 A Crim R 502 at 508.
>
> One of the incidents of a lengthy delay can be that the offender is left in an agony of mind, not knowing whether or not he will be charged. The applicant was not put into any such frame of mind. He was able confidently to rely, until the police were finally told, upon the complainant's not telling the police, in accordance with the understanding he believed had been reached [among the family].

In *R v EGC* [2005] NSWCCA 392, in referring to the distinction drawn in *R v Holyoak*, the applicant submitted that, while the rehabilitation of an offender is not necessarily a mitigating factor in cases where there is a time lapse between the commission of the offences and conviction for them, it is a powerful mitigating factor where delay was a consequence of the prosecuting authorities failing to expeditiously bring the offender to trial. Justice Latham, Sully and Hulme JJ agreeing, doubted whether such a neat distinction can be drawn. Justice Latham stated at [32]:

> nothing in the judgment [in *R v Holyoak*] suggests that the weight to be afforded to the rehabilitation of an offender varies according to whether delay has been occasioned by tardiness on the part of the prosecution.

In *R v EGC*, although police were notified in 1991, both the victim and her mother rejected police involvement. The victim's mother had in fact married the applicant six months after being told by the victim of the sexual assaults. Stating at [35] that "mere knowledge of such allegations cannot found a justifiable inference of deliberate inaction by prosecuting authorities", Latham J continued at [36]:

> A number of decisions of this court are consistent with the Judge's approach to this issue, in circumstances where the complainant and members of her family decline to make a statement or contact the police, despite some early intervention by welfare authorities. *V*, *Thompson* and *Humphries* all fall into that category and resulted in the dismissal of sentence appeals premised upon non-adherence to the principles established in *R v Todd* [1982] 2 NSWLR 517. In *V*, Wood CJ at CL cites *Thompson* and *Holyoak* amongst others, as illustrative of the proposition that leniency is not necessarily extended wherever there is a stale offence or substantial delay (at 300).

Although the court in *R v EGC* held that the sentencing judge did not fail to give sufficient weight to the applicant's rehabilitation in the context of the delay between notification of the assaults to police and charge, it found that the passage of time between the commission of the offences and sentence was capable of, and ought to have, constituted special circumstances. The Court of Criminal Appeal has recognised prosecution for a stale offence as a special circumstance warranting alteration of the statutory ratio: *R v Virgona* [2004] NSWCCA 415; *R v Fidow* [2004] NSWCCA 172.

In *Dousha v R* [2008] NSWCCA 263 at [30], where there was a delay of about 20 years, the court held that it was open to her Honour to conclude that rehabilitation was not established. Although the fact that a lengthy period has elapsed without further offences being committed may allow for a finding that an offender has either rehabilitated or has good prospects for doing so, such a finding is not mandated. Her Honour gave greater weight to the psychologist's opinion that the applicant possessed persisting features of paedophilic orientation: at [18], [29].

Pre-Trial Diversion of Offenders Program

The *Pre-Trial Diversion of Offenders Act* 1985 applied to "a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner": s 3A. It established a procedure whereby certain offenders are to be diverted from the ordinary curial path and made subject to a program of treatment intended to modify their criminal behaviour; the ultimate aim of the treatment being the reduction of the prospects of re-offending: *R v DWD* (unrep, 2/3/98, NSWCCA). As the legislation was explained when it was introduced into Parliament, the Act was based upon the theory that there are certain cases in which punishment is not an effective or appropriate deterrent. It has as its principal objective the protection and alleviation of the stress of victims of child sexual assault.

Following the repeal of the *Pre-Trial Diversion of Offenders Regulation* 2005 on 1 September 2012, the program closed. See *Attorney General for NSW v CMB* [2015] NSWCCA 166 at [5]–[12] for a legislative history.

Possibility of summary disposal

See discussion under **Sexual assault** at [20-770].

Health

Ill-health may be a mitigating factor where the evidence establishes that imprisonment will be more burdensome because of the offender's state of health or that imprisonment will have a "gravely adverse effect on the offender's health": *R v Smith* (1987) 44 SASR 587 at 589. See also *R v Bailey* (unrep, 3/6/88, NSWCCA); *R v Zappala* (unrep, 4/11/91, NSWCCA) at 5–6; *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Cole* (unrep, 29/3/94, NSWCCA) at 10. For a lengthy discussion on the principles relating to ill-health see *R v L* (unrep, 17/6/96, NSWCCA) at 6–9.

Ultimately, the fact that a person may suffer hardship in gaol by reason of some illness or disability is a matter for the prison authorities. It is their responsibility to ensure that the prisoner is not subjected to undue hardship: *R v Zappala* and *R v L*.

There may be exceptional cases where the offender's condition is so severe that imprisonment would be inhumane: *R v Vento* (unrep, 6/7/93, NSWCCA); *R v Dowe* (unrep, 1/9/95, NSWCCA) referred to in *R v L*.

Age

The age of the offender is relevant on sentence primarily on the basis that imprisonment may be more onerous for an older individual. There is no automatic reduction because of age. It is a matter to be considered together with the other circumstances of the case: *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Holyoak* (1995) 82 A Crim R 502. In *R v DCM* (unrep, 26/10/93, NSWCCA) at 3, Badgery-Parker J said, Kirby ACJ and Loveday AJ agreeing:

> Age is not a licence to commit sexual offences nor should it be thought that a person who commits such offences can then expect to be allowed to go free merely because of advanced years.

There is no principle that the offender should not be sentenced to a term that would result in him or her spending the rest of his or her life in gaol: *R v Varner*; *R v Holyoak*; *R v Gallagher* (unrep, 29/11/95, NSWCCA).

The youth of an offender may also be a relevant consideration. In *R v JJS* [2005] NSWCCA 225 the applicant, a 14-year-old boy who assaulted his three-year-old cousin contrary to s 61M(2), was sentenced to a 5-year good behaviour bond. The bond was reduced on appeal to a term of 3 years, the court finding that the sentence was unduly burdensome and inappropriate in the circumstances of the case.

Intellectual handicap/mental disorder

General deterrence should be given less weight in cases where the offender is suffering from a severe intellectual disability or mental disorder because such an offender is not an appropriate medium for making an example to others. The court moderates the consideration of general deterrence to the circumstances of the particular case. See the discussion about an offender's mental condition and *Muldrock v The Queen* (2011) 244 CLR 120 at [10-460].

In *R v Morrow* [1999] NSWCCA 64, where the intellectually disabled applicant was charged with one count of sexual intercourse with child under 10 years contrary to s 66A, the court dismissed the Crown appeal against a 5-year s 558 recognizance order. The applicant was suffering from serious depression and his ability to function in the general community was 99.9% lower than the rest of the population.

Where the offender knows what he or she is doing and understands the gravity of his or her actions, the moderation will not be great: *R v Champion* (1992) 64 A Crim R 244 at 254. See also *R v DCM* at 6–7; *R v Engert* (unrep, 20/11/95, NSWCCA); and *R v Monk* (unrep, 2/3/98, NSWCCA) at 3–5.

As to the relevance of an offender's mental condition for standard non-parole period offences see *Mental condition* in **What is the standard non-parole period?** at [7-910].

Offender undertakes treatment

It has been said that it is "an important matter in his favour" that the offender is prepared to undertake treatment for his sexual attraction to children. This is particularly so in cases involving Depo Provera treatment ("chemical castration"), where there are significant side effects. In *R v DCM* (unrep, 26/10/93, NSWCCA), the respondent was charged with 16 counts of child sexual assault offences involving five children over a period of 4 years and 5 months. In dismissing the Crown appeal and confirming the 300 hours community service and recognizance orders, Badgery-Parker J, Kirby ACJ

and Loveday AJ agreeing, had regard to "the quite exceptional circumstances of this case", including that the respondent underwent a course of treatment of Depo Provera and Androcur.

Extra-curial punishment

The sentencing court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property: *R v Allpass* (unrep, 5/5/93, NSWCCA). In *R v Holyoak* (unrep, 1/9/95, NSWCCA), the fact that the applicant had suffered substantially from personal harassment by media representatives as well as received a large volume of "hate" communications from members of the public, meant that the punishment commenced, in a real sense, before his sentence.

Section 24A(1) provides that, in sentencing an offender, the court must not take into account, as a mitigating factor, the fact that the offender has or may become:

(a) a registrable person under the *Child Protection (Offenders Registration) Act* 2000 as a consequence of the offence, or

(b) the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004, or

(c) as a consequence of being convicted of the offence, has become a disqualified person under the *Child Protection (Working with Children) Act* 2012, or

(d) the subject of an order under the *Crimes (High Risk Offenders) Act* 2006 (whether as a high risk sex offender or as a high risk violent offender).

Section 24A(1)(a)–(b) has effect despite any Act or rule of law to the contrary: s 24A(2). It applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59. Section 24A(1)(c) applies to offences whenever committed unless, before 3 March 2011, a court has convicted the person being sentenced of the offence, or a plea of guilty has been accepted and the plea has not been withdrawn: *Crimes (Sentencing Procedure) Act* 1999, Sch 2, Pt 21, cl 62.

For the position before the enactment of s 24A see *R v KNL* [2005] NSWCCA 260 at [49]–[50].

Hardship of custody for child sex offender

Protective custody is not automatically to be regarded as a circumstance mitigating the sentence: *Clinton v R* [2009] NSWCCA 276 at [24]; *R v Way* (2004) 60 NSWLR 168 at [176]–[177]; *R v Durocher-Yvon* (2003) 58 NSWLR 581. The Court of Criminal Appeal has repeatedly applied the principle that where an offender seeks to receive a reduction of sentence on the ground that conditions of imprisonment will be more onerous, it is for the offender to lead evidence of what those conditions entail: *Clarkson v R* [2007] NSWCCA 70 per Howie J, Sully J agreeing, at [273]. It will be an error to take into account in mitigation the fact that an offender will serve a sentence in protective custody — either in the determination of the sentences or in the finding of special circumstances under s 44(2) *Crimes (Sentencing Procedure) Act* — without evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21].

The Sentencing Council of NSW said in a report, *"Penalties Relating to Sexual Assault Offences in New South Wales"*, 2008, Vol 1, at [6.49]:

> In the case of sexual offenders, it is difficult to imagine that those prisoners who are assumed likely to serve their sentences in special management areas or in limited association areas, who have access to programs or services or a reasonable degree of association with other inmates, would qualify for special consideration. Each case would, however, need to depend on its own facts.

The Council expressed the view at [6.51] that "the conditions of protective custody should more actively be promoted to judicial officers".

A paper on protective custody by Domenic Pezzano, Superintendent Operations Branch, Corrective Services NSW, "*Information for ODPP/Courts on options for offenders who request protective custody — limited association and non-association*" (revised December 2010) describes the programs and employment opportunities.

[The next page is 9241]

Appeals

[70-000] Introduction

The section first discusses appeals for matters dealt with on indictment and then appeals from the Local Court. An appeal against sentence is a creature of statute. The precise nature of an appeal against sentence depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321 at [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8].

[70-010] Overview of Court of Criminal Appeal sentence appeals 2000–2018

Tables 1–4 list appeal success rates for the periods specified. They provide a general picture only and do not disclose the specific legal basis for intervention by the court.

Severity appeals

Table 1 — Severity appeals under s 5(1)(c) Criminal Appeal Act 1912 (2000–2018)

Year	Severity appeals	Allowed	
	N	n	%
2000	305	124	40.7
2001	339	135	39.8
2002	325	149	45.8
2003	269	111	41.3
2004	281	137	48.8
2005	317	141	44.5
2006	255	103	40.4
2007	239	95	39.7
2008	214	83	38.8
2009	226	78	34.5
2010	217	85	39.2
2011	188	93	49.5
2012	167	64	38.3
2013	223	57	25.6
2014	191	60	31.4
2015	206	75	36.4
2016	177	60	33.9
2017	192	61	31.8
2018	195	79	40.5
	4526	**1790**	**39.5**

Source: Judicial Commission NSW Court of Criminal Appeal database

Note: The severity appeals listed above include a small number of applications for an extension of time for leave to appeal against sentence that have been refused.

Table 1 shows the frequency of, and success rates for, severity appeals in NSW for the period 2000–2018. Putting aside 2013, the success rate for severity appeals has

hovered around 30–50%, with an overall success rate of 39.5%, for the relevant period. The highest success rate for severity appeals was recorded in 2011 (49.5%), while the lowest success rate was recorded in 2013 (25.6%). An earlier study undertaken by the Judicial Commission for appeals in the period 1996–2000 found that "[j]ust over one-third (34.9%) of sentence severity appeals were successful": P Poletti and L Barnes, "Conviction and Sentence Appeals in the New South Wales Court of Criminal Appeal 1996–2000", *Sentencing Trends & Issues*, No 22, Judicial Commission of NSW, 2002, Conclusions, p 8.

Table 1 also shows a general decline in the frequency of severity appeals between 2001–2018. The highest recorded frequency of severity appeals occurred in 2001 with the lowest recorded in 2012. There was a noticeable increase in the frequency of severity appeals in 2013 which coincided with an increase in the number of severity appeals for standard non-parole period (SNPP) offences (see below).

Table 2 — Severity appeals under s 5(1)(c) Criminal Appeal Act 1912 — SNPP offences (2004–2018)

Year	Severity appeals	Allowed	
	N	n	%
2004	6	5	83.3
2005	40	23	57.5
2006	56	31	55.4
2007	47	18	38.3
2008	63	26	41.3
2009	67	21	31.3
2010	77	31	40.3
2011	77	44	57.1
2012	64	32	50.0
2013	115	32	27.8
2014	73	25	34.2
2015	92	39	42.4
2016	79	26	32.9
2017	79	21	26.6
2018	87	33	37.9
	1022	**407**	**39.8**

Source: Judicial Commission NSW Court of Criminal Appeal database

Table 2 shows a subset of cases in severity appeals. It lists the frequency of, and success rates for, severity appeals in NSW for the period 2004–2018 where the principal offence committed by the applicant carried a standard non-parole period (SNPP severity appeals): Table to Pt 4 Div 1A *Crimes (Sentencing Procedure) Act* 1999. The lowest success rate for SNPP severity appeals was recorded in 2017 (26.6%).

On 5 October 2011, the High Court handed down its decision in *Muldrock v The Queen* (2011) 244 CLR 120. See further **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff. The decision had the effect of increasing the number of appeals for SNPP offences particularly appeals out of time (see [70-020] below).

Prior to 2015, only three of 30 post-*Muldrock* applications for an extension of time to appeal against sentence were successful. This may be contrasted to 2015 when there

were 14 post-*Muldrock* applications for an extension of time to appeal against sentence, nine of which were successful (64.3%). This change may be accounted for by the decision in *Kentwell v The Queen* (2014) 252 CLR 601. The High Court held that it is not necessary for an applicant to show that substantial injustice would be occasioned by the sentence (see the discussion under **Section 5(1)(c) severity appeals** at [70-020]).

Part 7 inquiries into sentence

Part 7 *Crimes (Appeal and Review) Act* 2001 provides that an offender can make an application to the Supreme Court for an inquiry into sentence after exhausting his or her appeal rights under s 5(1)(c) *Criminal Appeal Act* 1912. Part 7 has been utilised to correct *Muldrock* type sentencing errors: see the discussion at [7-955]. To avoid double counting, these appeals are not included in Tables 1 or 2. Between 2014–2018, there were a total of 24 Pt 7 appeals of which 15 were allowed (62.5%). The majority were dealt with in 2014 (17) with a success rate of 52.9%. All three Pt 7 appeals in 2016 and three of the four appeals in 2017 were successful. All but two between 2014–2018 involved grounds of appeal relating to *Muldrock*, of which 14 were successful. There were no Pt 7 applications in 2015 or 2018.

Crown appeals

Table 3 — Crown appeals under s 5D Criminal Appeal Act 1912 (2000–2018)

Year	Crown appeals	Allowed	
	N	n	%
2000	84	42	50.0
2001	56	35	62.5
2002	81	50	61.7
2003	66	32	48.5
2004	101	51	50.5
2005	57	36	63.2
2006	77	47	61.0
2007	57	35	61.4
2008	61	31	50.8
2009	44	27	61.4
2010	70	49	70.0
2011	33	15	45.5
2012	32	12	37.5
2013	32	18	56.3
2014	53	34	64.2
2015	26	12	46.2
2016	41	28	68.3
2017	25	18	72.0
2018	30	17	56.7
	1026	**589**	**57.4**

Source: Judicial Commission NSW Court of Criminal Appeal database

Table 3 shows the frequency of, and success rates for, Crown appeals in NSW for the period 2000–2018. The data reveals an overall success rate of 57.4% for the relevant period.

Table 4 — Crown appeals under s 5D Criminal Appeal Act 1912 for SNPP offences (2004–2018)

Year	Crown appeals	Allowed	
	N	n	%
2004	8	6	75.0
2005	6	5	83.3
2006	23	16	69.6
2007	21	14	66.7
2008	19	12	63.2
2009	22	16	72.7
2010	25	18	72.0
2011	14	9	64.3
2012	13	7	53.8
2013	10	5	50.0
2014	23	18	78.3
2015	10	2	20.0
2016	16	11	68.8
2017	13	10	76.9
2018	8	6	75.0
	231	**155**	**67.1**

Source: Judicial Commission NSW Court of Criminal Appeal database

Table 4 shows a subset of cases within Crown appeals. It lists the frequency of, and success rates for, Crown appeals where the principal offence carried a standard non-parole period (SNPP Crown appeals). The overall success rate for SNPP Crown appeals (67.1%) is higher than the overall success rate for all Crown appeals (57.4%).

[70-020] Section 5(1)(c) severity appeals

Section 5(1)(c) *Criminal Appeal Act* 1912 provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave.

Time limits and applications out of time

The provisions of the *Criminal Appeal Act* and the Criminal Appeal Rules relating to time limits and applications out of time are explained in *Kentwell v The Queen* (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) *Criminal Appeal Act* provides that a notice of intention to apply for leave to appeal is required to be given within 28 days from the date of sentence. If the notice of intention to apply for leave is not given, a notice of application for leave to appeal may be given within three months after the sentence: r 3B(1)(b) Criminal Appeal Rules. The court may extend the three month period: r 3B(2). The Rules confer a discretion to extend that period in a case where no notice of intention to apply for leave to appeal has been filed.

Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

The provisions of the *Criminal Appeal Act* and Rules which permit an extension of time have been repeatedly engaged in "Muldrock error cases". See also **Correcting**

sentences imposed pre-Muldrock at [7-960]. The applications should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: *Kentwell v The Queen* at [4], [30], [44]; *O'Grady v The Queen* (2014) 252 CLR 621 at [13]. In considering whether a court should grant an extension of time it must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: *Kentwell v The Queen* at [32]; *Abdul v R* [2013] NSWCCA 247 at [53] disapproved.

The prospect of success of the appeal is relevant. This involves consideration of the merits of an appeal. That issue is addressed by reference to s 6(3) *Criminal Appeal Act*: *Kentwell v The Queen* at [33]–[34]. As to the approach the court must take to s 6(3), see further below at [70-040].

The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: *Lowe v R* [2015] NSWCCA 46 at [14].

[70-030] The ordinary precondition of establishing error

Severity appeals under s 5(1)(c) *Criminal Appeal Act* 1912 are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. Nor is an appeal "the occasion for the revision and reformulation of the case presented below": *Zreika v R* [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish that the sentencing judge has made an error in the exercise of his or her discretion: *House v The King* (1936) 55 CLR 499 at 505. In *Markarian v The Queen* (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

See also the explanation of specific error in *Kentwell v The Queen* (2014) 252 CLR 601 at [42].

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned

from the reasons: *Hili v The Queen* at [59]. It was an error for the Court of Criminal Appeal in *Hili* to find that "manifest error is fundamentally intuitive": *Hili v The Queen* at [60].

Failure to attribute sufficient weight to an issue

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in *House v The King* (1936) 55 CLR 499: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [48] approving the approach taken by the CCA to a ground of appeal; *Majid v R* [2010] NSWCCA 121 at [40]; *Cole v R* [2010] NSWCCA 227 at [79]; *Yang v R* [2012] NSWCCA 49 at [25]. The principle applies whether the proceeding is a Crown appeal or a severity appeal: *Majid v R* at [40].

A ground of appeal asserting that a judge attributed insufficient weight to an issue has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: *DF v R* [2012] NSWCCA 171at [77]; *Hanania v R* [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: *Hanania v R* at [33].

Failure of defence to refer to matters at first instance later relied upon

It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the sentencing judge: *Stewart v R* [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: *Stewart v R* at [56], citing *Zreika v R* [2012] NSWCCA 44.

Errors of fact and fact finding on appeal

Factual findings are binding on the appellate court unless they come within the established principles of intervention: *AB v R* [2014] NSWCCA 339 at [44], [50], [59]; *R v Kyriakou* (unrep, 6/8/87, NSWCCA); *Skinner v The King* (1913) 16 CLR 336 at 339–340; *Lay v R* [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: *AB v R* at [52], [59]; *R v O'Donoghue* (unrep, 22/7/88, NSWCCA); *Kentwell v The Queen* (2014) 252 CLR 601 at [35]; *Hopley v R* [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of *House v The King* (1936) 55 CLR 499 as a ground of appeal: *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24]; *Camm v R* [2009] NSWCCA 141 at [68]; *Cao v R* [2010] NSWCCA 109 at [48].

It is incumbent on the applicant to show that the factual finding was not open: *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: *AB v R* at [59]. The court cannot review the finding of fact made and substitute its own findings: *R v O'Donoghue* at 401.

In *Clarke v R* [2015] NSWCCA 232 at [32]–[36] and *Hordern v R* [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of *R v O'Donoghue* and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view

has failed to receive support in subsequent judgments of the court: see *Yin v R* [2019] NSWCCA 217 at [27]; *Gibson v R* [2019] NSWCCA 221 at [2]–[6]; *TH v R* [2019] NSWCCA 184 at [1]; [22]–[23].

If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: *R v MD* [2005] NSWCCA 342 at [62]; *R v Merritt* (2004) 59 NSWLR 557 at [61]; *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24].

There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: *Lay v R* at [51]; *Aoun v R* [2011] NSWCCA 284. Where a factual error has been made in the *House v The King* sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: *Lay v R* at [53] applying *Kentwell v The Queen* at [40]–[43].

[70-040] Section 6(3) — some other sentence warranted in law

Section 6(3) *Criminal Appeal Act* 1912 provides:

> On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

It is only open to the CCA to quash the sentences if it is of the opinion stipulated in s 6(3) as one "that some other sentence ... is warranted in law and should have been passed": *Elliott v The Queen* (2007) 234 CLR 38 at [34].

The phrase "is warranted in law" assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it: *Elliott v The Queen* at [36].

Once a specific error of the kind identified in *House v The King* (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: *Kentwell v The Queen* (2014) 252 CLR 601 at [42] citing Spigelman CJ in *Baxter v R* [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: *Baxter v R*. The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: *Kentwell v The Queen* at [42]; *Thammavongsa v R* [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made for the purposes of checking that the sentence arrived at by the appellate court does not exceed the original sentence: *Thammavongsa v R* at [5]–[6]. The point of comparison with the original sentence is undertaken at the end of the process required under s 6(3): *Thammavongsa v R* at [5]–[6], [25].

Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: *Kentwell v The Queen* at [42].

In *Lehn v R* (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the

sentencing exercise, the court is required under s 6(3) *Criminal Appeal Act* 1912 to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): *Lehn v R* per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: *Lehn v R* at [68]. The High Court in *Kentwell v The Queen* at [42] held that the CCA's role on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome. The CCA's task is to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: *Lehn v R* at [77] quoting *Kentwell v The Queen*. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: *Lehn v R* at [78].

There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: *Lehn v R* at [72]. For example, where an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: *Lehn v R* at [72]. In *Greenyer v R* [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: *Greenyer v R* at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court.

The sentencing error in *Lehn v R* of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: *Lehn v R* at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: *Lehn v R* at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: *Lehn v R* at [65], [118], [128], [140].

The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: *Kentwell v The Queen* at [43]. If the court concludes either that the same sentence or a greater sentence should be imposed, it is not required to re-sentence: *Kentwell v The Queen* at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: *Kentwell v The Queen* at [43] citing *Neal v The Queen* (1982) 149 CLR 305 at 308.

The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease: *Thammavongsa v R* at [3], [16]. Such a submission lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: *Thammavongsa v R* at [16].

Reception of evidence following finding of error

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: *Betts v The Queen* (2016) 258 CLR 420 at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: *Kentwell v The Queen* at [43] citing *Douar v R* [2005] NSWCCA 455 at [124] and *Baxter v R* at [19] with approval. In *Douar v R* at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: *R v Deng* [2007] NSWCCA 216 at [43]; *R v Fordham* (unrep, 2/12/97, NSWCCA).

The appellant cannot run a "new and different case": *Betts v The Queen* at [2]. It is not the case that once error is demonstrated, the appellate court may receive *any* evidence capable of bearing on its determination of the appropriate sentence: *Betts v The Queen* at [8], [12]–[13] approving *R v Deng* [2007] NSWCCA 216 at [28]. The conduct of an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by *House v The King* (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: *Betts v The Queen* at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: *Betts v The Queen* at [14].

In *Betts v The Queen*, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: *Betts v The Queen* at [57]–[59].

The power to remit under ss 12(2) and 6(3)

Section 12(2) *Criminal Appeal Act* 1912 provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made".

The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: *Betts v The Queen* at [17]. The issue was unnecessary to determine in *Betts v The Queen* at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): *Betts v The Queen* at [17].

The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in *O'Neil-Shaw v R* [2010] NSWCCA 42: *Betts v The Queen* at [19].

It was held in *O'Neil-Shaw v R* at [56] that s 6(3) ought not to be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: *O'Neil-Shaw v R*

at [32]. Remittal under s 12(2) *Criminal Appeal Act* is the more appropriate course since this will permit a judge to determine the question of sentence upon the evidence adduced in the second hearing: *O'Neil-Shaw v R* at [57].

The meaning of "sentence" in s 6(3)

An aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act* 1999 is a "sentence" within s 6(3): *JM v R* [2014] NSWCCA 297 at [40]; see also **[7-508] Appellate review of an aggregate sentence**. There are a multitude of cases, subsequent to *JM v R*, where it has been said that the appeal is against the aggregate sentence rather than the individual indicative sentences: see, for example, *R v Kennedy* [2019] NSWCCA 242 at [78]; *DS v R* [2017] NSWCCA 37 at [63]–[64]. It is quite settled law.

In determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences: *JM v R* at [40]; *Gibson v R* [2019] NSWCCA 221 at [88].

In the past there was an issue about whether the word "sentence" in s 6(3) refers only to a specific sentence for a particular offence and did not include a reference to an overall effective sentence: see *R v Bottin* [2005] NSWCCA 254 (as to the latter) and *Arnaout v R* [2008] NSWCCA 278 at [21] (as to the former). That debate was noted in *Nahlous v R* (2010) 77 NSWLR 463 at [12] and by Hodgson JA in *McMahon v R* [2011] NSWCCA 147 at [2]–[4].

[70-060] Additional, fresh and new evidence received to avoid miscarriage of justice

The Court of Criminal Appeal has flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice: *Betts v The Queen* (2016) 258 CLR 420 at [2], [10] citing *R v Abbott* (unrep, 12/12/85, NSWCCA); *R v Goodwin* (unrep, 3/12/90, NSWCCA); *R v Araya* (unrep, 17/7/92, NSWCCA); *R v Fordham* (unrep, 2/12/97, NSWCCA) and *Gallagher v The Queen* (1986) 160 CLR 392 at 395. A distinct set of principles has emerged as to the admission and use of additional evidence: *Khoury v R* [2011] NSWCCA 118 at [105]; *Tran v R* [2014] NSWCCA 32 at [12]; *Grant v R* [2014] NSWCCA 67 at [55]. More than one approach has been adopted (as explained below).

The conventional approach is for the court to ask whether the additional evidence is "fresh", that is, evidence which the applicant was unaware of and could not have obtained with reasonable diligence: *R v Goodwin* (unrep, 3/12/90, NSWCCA); *R v Abou-Chabake* [2004] NSWCCA 356 at [63]. Fresh evidence is to be contrasted with new evidence which is not received. It is evidence that was available at the time, but not used. It is evidence which could have been obtained with reasonable diligence: *Khoury v R* at [107]; *R v Many* (unrep, 11/12/90, NSWCCA). Even if evidence is fresh, it will not be received by the court unless it affects the outcome of the case: *R v Fordham* at 378. For example, the evidence in *Bajouri v R* [2016] NSWCCA 20 of images on Facebook showing the victim doing activities such as jet skiing 10 months after the assault offence and 18 months before his victim impact statement could not qualify as fresh evidence. It did not contradict or cast doubt on the contents of the victim impact statement: *Bajouri v R* at [44], [46], [51].

Evidence of facts that have arisen entirely after sentence

The past tense used in s 6(3) "some other sentence, whether more or less severe is warranted in law and should have been passed" has the effect according to Simpson J in *Khoury v R* [2011] NSWCCA 118 at [110] that:

> … evidence of events or circumstances or facts that have arisen *entirely* since sentencing cannot be taken into account, no matter how compelling they may be. If the facts did not exist at the time of sentencing, it cannot have been an error for the sentencing judge not to have taken them into account … [Emphasis added.]

See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]. While there is some flexibility with respect to the application of this principle (see *Agnew v R* at [39]–[40] and the discussion below) the view, for example, that a post-sentence reduction in a custodial sentence for assistance to authorities can be achieved by means of an appeal where no error or miscarriage has been found should not be encouraged: *Agnew v R* at [40]–[42].

Evidence that an applicant assisted authorities post sentence: *JM v R* [2008] NSWCCA 254, or had a medical condition that did not exist at sentence, has not been received by the court: *Khoury v R* at [111]–[112].

Evidence of factual circumstances which existed at sentence

The Court of Criminal Appeal has received additional evidence of facts or circumstances which existed at the time of sentencing, even if not known, or imperfectly understood, at that time: *Khoury v R* [2011] NSWCCA 118 at [113]. That is, circumstances existed which were known at sentence but their significance was not appreciated: *Khoury v R* at [114]–[115]. See the examples referred to in *Springer v R* [2007] NSWCCA 289 at [3]. The rationale for the receipt of the additional evidence is that the sentencing court proceeded on an erroneous view of the facts before it: *Khoury v R* at [113].

The decision to admit additional evidence is discretionary and caution must be exercised: *Khoury v R* at [117]; *Wright v R* [2016] NSWCCA 122 at [19], [71]. The applicant must establish a proper basis for the admission of the evidence: *Khoury v R* at [117]. Relevant factors to be taken into account according to Simpson J in *Khoury v R* at [121] include:

> … the circumstances of, and any explanation for, the non-production of the evidence — a deliberate decision on the part either of the applicant, or his or her legal representatives, ignorance in the applicant of the significance of the evidence, resulting in its not being communicated to the legal representatives, incompetent legal representation [and] … the potential significance of the evidence to have affected the outcome at first instance …

Two categories of case have emerged:

- medical evidence cases: *Khoury v R* at [115]
- assistance to authorities cases: *R v Many* (unrep, 11/12/90, NSWCCA).

Medical evidence cases

The general principle is that parties will not normally be able to produce fresh or new evidence on appeal. The principle reflects the importance of finality: *Cornwell v R* [2015] NSWCCA 269 at [39]. However, evidence as to a medical condition may

form the basis for an exception to this principle where it is in the interests of justice: *Cornwell v R* at [39], [57], [59]; *Turkmani v R* [2014] NSWCCA 186; *Khoury v R* [2011] NSWCCA 118 at [115]; *Dudgeon v R* [2014] NSWCCA 301.

In *Turkmani v R*, the court at [66] identified three categories of case where fresh evidence is sought to be adduced in relation to the health of an offender. First, where the offender was only diagnosed as suffering from a condition after sentence but was affected at the time of sentence; secondly where, although the symptoms of a condition may have been present, their significance was not appreciated and; thirdly where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but did not. See the discussion of *Turkmani v R* in *Wright v R* [2014] NSWCCA 186 at [73].

The discretion to admit fresh evidence of an offender's medical condition was permitted in *Cornwell v R* on the basis that he was clearly suffering Huntington's disease at the time of sentencing which was likely to make custody more burdensome for him: *Cornwell v R* at [59], [64]. The evidence established that the pre-sentence instructions given by the applicant to his legal representatives — that he did not wish to undergo testing for the disease — were justified by psychological factors including the fear of a positive diagnosis following his experience of family members with the same disease: *Cornwell v R* at [58].

In *Wright v R*, the applicant was sentenced upon the basis that he was in poor health and was of advanced age. Following sentence he was subsequently diagnosed with Alzheimer's disease. Although the evidence qualified as fresh evidence that the court could receive, the court exercised its discretion not to admit it because the evidence would not have made a significant difference to the sentence imposed by the judge: *Wright v R* at [1], [20], [84], [98], [100].The sentence already represented a lenient outcome: *Wright v R* at [86].

As to psychological conditions, there is an unresolved issue as to whether the additional evidence is the psychological condition existing at the time or the later diagnosis by the expert in a report prepared after sentence proceedings: *Khoury v R* at [118], quoting Basten JA in *Einfeld v R* [2010] NSWCCA 87 at [45], [50]. A psychological report prepared after sentence is not necessarily fresh or new evidence because it was prepared after sentence: *Khoury v R* at [120], but see *R v Fordham* at 377–378.

Assistance to authorities

In the particular circumstances of *ZZ v R* [2019] NSWCCA 286, the court concluded that information provided by the applicant in an interview with police upon her arrest which, after the sentence proceedings, resulted in arrests overseas, qualified as fresh evidence and resulted in a reduction of her sentence on appeal: at [29]–[30], [33]–[34].

[70-065] Miscarriage of justice arising from legal representation

The general rule as set out in *R v Birks* (1990) 19 NSWLR 677 at 683 and 685 that "a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted" applies to sentencing proceedings: *Khoury v R* [2011] NSWCCA 118 at [104]; *Tran v R* [2014] NSWCCA 32 at [12]; *CL v R* [2014] NSWCCA 196. However, fresh evidence has been admitted

by the Court of Criminal Appeal without error being established where a miscarriage of justice occurred because the applicant was incompetently or carelessly represented at sentence: *R v Fordham* at 377–378, citing *R v Abbott* (unrep, 12/12/85, NSWCCA); *Munro v R* [2006] NSWCCA 350 at [23]–[24].

Where evidence was available to the defence at the time of sentencing, a miscarriage of justice will rarely result simply from the fact that the evidence was not put before the sentencing judge, even if the evidence may have had an impact upon the sentence passed: *R v Fordham* at 377.

Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked better: *Ratten v R* (1974) 131 CLR 510 at 517; *R v Diab* [2005] NSWCCA 64 at [19].

In *Khoury v R*, counsel said it did not occur to him to call psychiatric evidence concerning the applicant's low intellectual functioning. Evidence was received on appeal by the Court of Criminal Appeal because of its significance in the case: see the explanation of *Khoury v R* in *Grant v R* [2014] NSWCCA 67 at [57]. Conversely, in *Grant v R*, the court refused the admission of two psychological reports prepared many years after sentence proceedings: *Grant v R* at [58].

A miscarriage of justice was found in *Grant v R* where the applicant pleaded guilty to manslaughter on the basis of excessive self-defence because the legal representative: failed to explain to the client the various states of mind within the offence of manslaughter; failed to obtain clear instructions from the client on that issue; and, informed the court what he thought was his client's intention without having obtained clear instructions on the issue: *Grant v R* at [71], [77].

[70-070] Crown appeals for matters dealt with on indictment

Section 5D(1) *Criminal Appeal Act* 1912 provides:

> The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

Although the Attorney General (NSW) has a statutory right to appeal against sentence, it has only been exercised once since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the *Director of Public Prosecutions Act* 1986 (NSW). See *CMB v Attorney General for NSW* (2015) 256 CLR 346. The decision to institute a Crown appeal is made by the DPP, although the Executive government sometimes requests that the DPP consider an appeal on behalf of the Crown to correct a sentence perceived to be inadequate.

Time limits to appeal and specifying grounds

Neither s 10(1) *Criminal Appeal Act* (which provides that an appeal must be filed 28 days from the date of sentence), nor r 3B Criminal Appeal Rules apply to Crown

appeals: *R v Ohar* (2004) 59 NSWLR 596. While there is no formal time limit, the delay in bringing such an appeal is relevant to the court's exercise of its discretion to intervene: *Green v The Queen* (2011) 244 CLR 462 at [43]. Rule 23E Criminal Appeal Rules headed "Notice of Crown appeal" provides that a notice of a Crown appeal is to be sent to the registrar by the appellant and the appellant is to serve a copy of the notice on the respondent as soon as practicable after sending the notice to the registrar.

Rule 23E makes no reference to the notice of a Crown appeal containing grounds. This is to be contrasted with the equivalent r 23C directed at severity appeals which require the leave of the court.

At some stage a formal document identifying the grounds should be brought into existence in a Crown appeal: *R v JW* (2010) 77 NSWLR 7 at [33], [35]. The court acknowledged in *R v JW* at [33] that it is a desirable "rule of practice", within the meaning of r 76, that a Crown appeal should identify grounds of appeal in the notice of appeal. However, that practice does not require grounds to be identified when the notice is first filed and failure to do so does not render the appeal incompetent: *R v JW* at [33]. The High Court decision of *Carroll v The Queen* (2009) 83 ALJR 579 does not imply a contrary position: *R v JW* at [35].

[70-080] Matters influencing decision of the DPP to appeal

The NSW Prosecution Guideline Chapter 10: DPP appeals, at [10.2], states in part that the DPP will only lodge an appeal if satisfied that:

1. all applicable statutory criteria are established
2. there is a reasonable prospect that the appeal will succeed
3. it is in the public interest.

The Guideline states, at [10.4] Appeals against sentence, that the primary purpose of DPP sentence appeals to the Court of Criminal Appeal is to allow the court to provide governance and guidance to sentencing courts. The Guideline recognises that such appeals are, and ought to be, rare. The Guideline states they should be brought in appropriate cases:

1. to enable the courts to establish and maintain adequate standards of punishment for crime
2. to enable idiosyncratic approaches to be corrected
3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

The *Prosecution policy of the Commonwealth: guidelines for the making of decisions in the prosecution process* (issued by the CDPP in July 2021) sets out the Director's policy in relation to Commonwealth prosecution appeals against sentence. It can be accessed from "Prosecution Process" on the CDPP website.

Guideline 6.35 of the Commonwealth prosecution policy states that the prosecution right to appeal against sentence "should be exercised with appropriate restraint" and "consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful". Guideline 6.36 further states that an appeal against sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation.

[70-090] Purpose of Crown appeals

The primary purpose of a Crown appeal is to lay down principles for the governance and guidance of courts with the duty of sentencing convicted persons: *Green v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [1], [36], quoting Barwick CJ in *Griffith v The Queen* (1977) 137 CLR 293 at 310. See also *R v DH* [2014] NSWCCA 326 at [19]; *R v Tuala* [2015] NSWCCA 8 at [98]. Their Honours in *Green v The Queen* continued at [36]:

> That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

The High Court affirmed the above passage in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [55].

Severity appeals on the other hand are concerned with the correction of judicial error in particular cases: *Green v The Queen* at [1]. The purpose of Crown appeals extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing: *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]–[62].

The two hurdles in Crown appeals

In a Crown appeal against sentence, the Crown is required to surmount two hurdles: firstly, it must identify a *House v The King* [(1936) 55 CLR 499 at 505] error in the sentencing judge's discretionary decision; and secondly, it must negate any reason why the residual discretion of the CCA not to interfere should be exercised: *CMB v Attorney General for NSW*, above, at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 per Heydon JA at [12] with approval. The discretion is residual only in that its exercise does not fall to be considered unless *House v The King* error is established: *CMB v Attorney General for NSW* at [33], [54]. Once the discretion is enlivened, it remains incumbent on the Crown as the appellant under s 5D to demonstrate that the discretion should be exercised: *CMB v Attorney General for NSW* at [33], [54].

Error and manifest inadequacy

The court may only interfere where error, either latent or patent, is established: *Dinsdale v The Queen* at [61]; *Wong and Leung v The Queen* (2001) 207 CLR 584 at [58], [109]. The bases of intervention in *House v The King* (1936) 55 CLR 499 at 505 are not engaged by grounds of appeal which assert that the judge erred by (a) failing to properly determine the objective seriousness of the offence, or (b) failing to properly acknowledge the victim was in the lawful performance of his duties, or (c) by giving excessive weight to an offender's subjective case to reduce the sentence: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *R v Tuala* [2015] NSWCCA 8 at [44]. These are just "particulars of the ground that the sentence was manifestly inadequate": *Bugmy v The Queen* at [22], [53].

Assessment of objective seriousness

It is open to an appeal court in a Crown appeal to form a different view from the sentencing judge as to the objective seriousness of an offence where the (only) *House v The King* error asserted is that the sentence is "plainly unjust": *Carroll v The*

Queen (2009) 83 ALJR 579 at [24]. However, in reaching its conclusion, the appeal court cannot discard the sentencing judge's factual findings where the findings are not challenged: *Carroll v The Queen* at [24]. In *Decision Restricted* [2014] NSWCCA 116 at [79]–[89], Simpson J expressed reservations about the authority of *Mulato v R* [2006] NSWCCA 282 in light of the approach in *Carroll v The Queen* at [24] described above: *Sabongi v R* [2015] NSWCCA 25 at [70]. Spigelman CJ had said in *Mulato v R*:

> Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself …

Mulato v R was applied in *Stoeski v R* [2014] NSWCCA 161 at [46]. A subsequent application for special leave to appeal to the High Court, on the basis her Honour's statement at [46] was wrong in principle, was refused: *Stoeski v The Queen* [2015] HCA Trans 19. The court in *Sabongi v R* at [72] held, after reference to *Stoeski v R* [2014] NSWCCA 161 at [46] that: "… the observations of Spigelman CJ and Simpson J in *Mulato* should be applied in New South Wales".

The court in *Ramos v R* [2015] NSWCCA 313 held that notwithstanding what the High Court said in *Carroll v The Queen* at [24] — that "it was open to the Court of Criminal Appeal to form a view different from the primary judge about where, on an objective scale of offending, the appellant's conduct stood" — neither *Carroll v The Queen* nor *Mulato v R* represent any departure from the principles laid down in *House v The King* (1936) 55 CLR 499: per Basten JA at [41] and Campbell J agreeing at [72]. The relevant question is whether the assessment of the objective seriousness of the offending was outside the range properly available to the sentencing judge: *Ramos v R* at [41].

See earlier discussion under **Errors of fact and fact finding on appeal** in [70-030].

Specific error alone is not enough to justify interference in a Crown appeal; the Crown must also demonstrate that the sentence is manifestly inadequate: *R v Janceski* [2005] NSWCCA 288 at [25]. In a Crown appeal, the court must make an express finding that the sentence imposed at first instance is manifestly inadequate and the power to substitute the sentence is not enlivened by a finding that the court would have attributed less weight to some factors and more to others: *Bugmy v The Queen* at [24]; *R v Tuala* at [44]. The court must be satisfied that the discretion miscarried, resulting in the judge imposing a sentence which was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards": *Bugmy v The Queen* at [24], [55]. If that is the case, the court has to then consider whether the Crown appeal "should nonetheless be dismissed in the exercise of the residual discretion": at [24].

As to the residual discretion see further below at [70-100].

Manifest inadequacy and reasons

Manifest excess or inadequacy of a sentence is shown by a consideration of all of the matters that are relevant to fixing a sentence. By its nature, manifest inadequacy does not allow lengthy exposition: *Hili v The Queen* (2010) 242 CLR 520 at [60]. Reference by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of an offender, may sufficiently reveal the bases for a conclusion that a sentence is manifestly excessive: *Hili v The Queen* at [60].

As to the application of the parity principle in Crown appeals see **Parity** at **[10-850]**.

Aggregate sentences

Section 5D *Criminal Appeal Act* permits the Crown to appeal "against any sentence pronounced". The Crown cannot appeal an indicative sentence (the sentence that would have been imposed for an individual offence under s 53A(2)(b) *Crimes (Sentencing Procedure) Act*) because it is neither pronounced nor imposed: *R v Rae* [2013] NSWCCA 9 at [32]. Where an aggregate sentence is imposed only one sentence is pronounced: *R v Rae* at [32]. The appellate court can, however, consider submissions as to the inadequacy or otherwise of an indicative sentence in determining whether an aggregate sentence is inadequate: *R v Rae* at [33] citing the approach in the previous decisions of *PD v R* [2012] NSWCCA 242 at [44] and *R v Brown* [2012] NSWCCA 199 at [17].

Double jeopardy principle

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2009 abolished the principle of double jeopardy in Crown appeals on sentence. A new s 68A entitled "Double jeopardy not to be taken into account in prosecution" was inserted into the *Crimes (Appeal and Review) Act* 2001. It provides:

> (1) An appeal court must not:
>
> (a) dismiss a prosecution appeal against sentence, or
>
> (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
>
> because of any element of double jeopardy involved in the respondent being sentenced again.
>
> (2) This section extends to an appeal under the *Criminal Appeal Act* 1912 and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

The terms of s 68A(1), "[an] appeal court", and s 68A(2), "extends to an appeal under the *Criminal Appeal Act* 1912", on their face appear also to apply to Crown appeals from the Local Court to the District Court. The Agreement in Principle Speech and Explanatory Notes to the Bill can be found in the recent law item for the amending Act on JIRS.

The expression "double jeopardy" in s 68A is limited to "the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence": *R v JW* (2010) 77 NSWLR 7 at [54]. Chief Justice Spigelman said at [141] (with support of other members of the Bench at [205] and [209]):

> (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
>
> (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
>
> (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.

(iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.

(v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

Application of s 68A to Commonwealth Crown appeals

The High Court held in *Bui v DPP (Cth)* (2012) 244 CLR 638 that ss 289–290 *Criminal Procedure Act* 2009 (Vic) (which are materially similar double jeopardy provisions to s 68A) do not apply to Crown appeals against sentence for a Commonwealth offence. The court made explicit reference to the NSW decision of *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 in deciding the issue. See also *DPP (Cth) v Afiouny* [2014] NSWCCA 176 at [75]. Section 80 *Judiciary Act* 1903 (Cth), which enables State courts to exercise federal jurisdiction, allows the common law to apply where it has not been modified by State legislation and so far as the laws of the Commonwealth are not applicable or their provisions insufficient: *Bui* at [27]. The High Court held that no question of picking up the Victorian provisions arose because the issue can be resolved by reference to s 16A *Crimes Act* 1914 (Cth) itself. In short, there is "no gap" in the Commonwealth laws: *Bui* at [29]. Section 16A does not accommodate the common law principle of "presumed anxiety": *Bui* at [19]. The same reasoning applies to s 68A.

Although presumed anxiety cannot be read into the text of s 16A(1), actual mental distress can be taken into account under s 16A(2)(m) both when the court is determining whether to intervene and in resentencing: *Bui* at [21]–[24], approving *DPP (Cth) v De La Rosa*. Simpson J's view in that case of s 16A(2)(m) at [279]–[280] — that it is limited to a condition of distress and anxiety which is the subject of proof — is to be preferred to the views expressed by Allsop P and Basten JA: *Bui* at [23]. Section 16A(2)(m) refers to the actual mental condition of a person, not his or her presumed condition. A condition of distress or anxiety must be demonstrated before s 16A(2)(m) applies: *Bui* at [23].

Counsel for the respondent in *R v Nguyen* [2010] NSWCCA 238 at [125]–[127] unsuccessfully relied upon the offender's anxiety and distress suffered as a consequence of the Crown appeal.

Rarity

It was long established at common law that appeals by the Crown should be rare: *Malvaso v The Queen* (1989) 168 CLR 227. The application of that factor has been abolished, see *R v JW* at [141] in (v) (see above). In *R v JW* at [124], [129], Spigelman CJ said that insofar as "rarity" was intended to apply as a sentencing principle by way of guidance to courts of criminal appeal, it should be understood as reflecting the double jeopardy principle, now abolished. Other reasons for the frequency or otherwise of such appeals are not matters that are generally of concern to a court of criminal appeal. They are directed to the prosecuting authorities.

[70-100] The residual discretion to intervene

Once error is identified in a Crown appeal, the court is not obliged to embark on the resentencing exercise: *R v JW* (2010) 77 NSWLR 7 at [146]. The court has a discretion to refuse or decline to intervene even if error is established: *R v JW* at [146]; *Green v The Queen* (2011) 244 CLR 462 at [1], [26]; *R v Reeves* [2014] NSWCCA 154 at [12].

It is an error for the court to fail to consider the exercise of its residual discretion to dismiss the Crown appeal despite finding error: *Bugmy v The Queen* (2013) 249 CLR 571 at [24]; *Reeves v The Queen* (2013) 88 ALJR 215 at [60]–[61].

Two questions are relevant to the exercise of the residual discretion: first, whether the court should decline to allow the appeal even though the sentence is erroneously lenient; and second, if the appeal is allowed, to what extent the sentence should be varied: *R v Reeves* at [13]; *Green v The Queen* at [35]. The purpose of Crown appeals is not simply to increase an erroneous sentence. The purpose is a "limiting purpose" to establish sentencing principles and achieve consistency in sentencing: *R v Reeves* at [14]–[15]; *Griffiths v The Queen* (1977) 137 CLR 293 at [53]; *R v Borkowski* [2009] NSWCCA 102 at [70]. Where the guidance provided to sentencing judges is limited, for example, because the proceedings are subject to non-publication orders, it may be appropriate to dismiss the appeal in the exercise of the residual discretion: *HT v The Queen* (2019) 93 ALJR 1307 at [51]; [55]; [90].

In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing: *R v Reeves* at [19]; *R v Deng* [2007] NSWCCA 216 at [28]; *R v Allpass* (unrep, 5/5/93, NSWCCA).

The onus is on the Crown to negate any reason why the residual discretion should be exercised: *R v Hernando* [2002] NSWCCA 489 at [12], cited with approval in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [34], [66]. Previous cases, such as *R v Loveridge* [2014] NSWCCA 120 at [248]–[249]; *R v Gavel* [2014] NSWCCA 56 at [125] and *R v Smith* [2007] NSWCCA 100 at [34], [66], which hold either that the onus is on the respondent or there is no onus on either party, are contrary to *CMB v Attorney General for NSW* at [34], [66], [69].

Section 68A(1) expressly removes double jeopardy as a discretionary consideration for refusing to intervene: *R v JW* at [95] but it "leaves other aspects untouched" and "there remains a residual discretion to reject a Crown appeal" for reasons other than double jeopardy: *R v JW* per Spigelman CJ at [92], [95] (other members of the court agreeing at [141], [205], [209]).

The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand: *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.

Factors that bear upon the residual discretion

The category of factors that bear upon the residual discretion are not closed. Rarity and the frequency of Crown appeals is no longer a relevant consideration: *R v JW* at [129].

Conduct of the Crown

A consideration weighing strongly against interference is a Crown concession before the sentencing judge that a non-custodial sentence is appropriate: *CMB v Attorney General for NSW* at [64]. The Crown has a duty to assist a sentencing court to avoid appellable error: *CMB v Attorney General for NSW* at [38], [64]. The failure of the Crown to indicate that a proposed sentence is manifestly inadequate is a material consideration in the exercise of the CCA's residual discretion: *CMB v Attorney General for NSW* at [64]. When the Crown asks the CCA to set aside a sentence on

a ground, which was conceded in the court below, the CCA in the exercise of its discretion should be slow to interfere: *CMB v Attorney General for NSW* at [38], [64], [68]; citing *R v Jermyn* (1985) 2 NSWLR 194 at 204 with approval. The forensic conduct of the Crown at first instance such as lack of challenge by the Crown or positively leading the court into error is an important consideration: *R v Allpass* (unrep, 5/5/93, NSWCCA); *R v Chad* (unrep, 13/5/97, NSWCCA); *R v JW* at [92].

Other factors

Some of the other factors that may favour the exercise of the discretion are as follows:

- delay by the Crown in lodging the appeal: *R v Hernando* at [30]; *R v JW* at [92]; *R v Bugmy (No 2)* [2014] NSWCCA 322 at [19], [101]
- conducting a case on appeal on a different basis from that pursued at first instance: *R v JW* at [92]
- delay in the resolution of the appeal: *R v Price* [2004] NSWCCA 186 at [60]; *R v Cheung* [2010] NSWCCA 244 at [151]; *R v Hersi* [2010] NSWCCA 57 at [55]
- the fact a non-custodial sentence was imposed on the offender at first instance: *R v Y* [2002] NSWCCA 191 at [34]; *R v Tortell* [2007] NSWCCA 313 at [63]
- the fact the non-parole period imposed at first instance has already expired: *R v Hernando* at [30]; or the fact the respondent's release on parole is imminent: *Green v The Queen* at [43]
- the fact the offender has made substantial progress towards rehabilitation: *CMB v Attorney General for NSW* at [69]
- "the effect of re-sentencing on progress towards the respondent's rehabilitation": *Green v The Queen* at [43]
- where resentencing would create disparity with a co-offender: *R v Bavin* [2001] NSWCCA 167 at [69]; *R v McIvor* [2002] NSWCCA 490 at [11]; *R v Cotter* [2003] NSWCCA 273 at [98]; *R v Borkowski* at [67]; *Green v The Queen* at [37]. See **Crown appeals and parity** at **[10-850]**
- the deteriorating health of the respondent since sentence: *R v Yang* [2002] NSWCCA 464 at [46]; *R v Hansel* [2004] NSWCCA 436 at [44]
- the fact that, were the court to impose a substituted sentence, the increase would be so slight as to constitute 'tinkering': *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]; *R v Woodland* [2007] NSWCCA 29 at [53]
- the guidance provided to sentencing judges will be limited and the decision will result in injustice: *Green v The Queen* at [2]; *CMB v Attorney General for NSW* at [69]
- the case is unlikely to ever arise again: *CMB v Attorney General for NSW* at [69].

[70-110] Resentencing following a successful Crown appeal

If a Crown appeal against sentence is successful and the appellate court resentences the respondent, it does so in the light of all the facts and circumstances as at the time of resentencing: *R v Warfield* (1994) 34 NSWLR 200 at 209, following *R v Allpass*

(unrep, 5/5/93, NSWCCA). The court will admit evidence of matters occurring after the date of the original sentencing to be taken into account on this basis: *R v Deng* [2007] NSWCCA 216 at [28].

Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: *R v JW* (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in *R v Parkinson* [2010] NSWCCA 89 at [49]–[51].

For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see **Power to reduce penalties for assistance to authorities** at [12-240].

[70-115] Judge may furnish report on appeal

Section 11 *Criminal Appeal Act* 1912 provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case.

A s 11 report should only be provided in exceptional circumstances: *R v Sloane* [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way: *Vos v R* [2006] NSWCCA 234 at [26]; *R v Sloane* at [9]. The relevant and permissible functions of a report are set out in *R v Sloane* at [10]–[12]; see also *Zhang v R* [2018] NSWCCA 82 at [37]–[39].

[70-120] Severity appeals to the District Court

Any person who has been sentenced by the Local Court may appeal to the District Court against the sentence: s 11(1) *Crimes (Appeal and Review) Act* 2001. The appeal is by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings: s 17.

The nature of an appeal "by way of rehearing" was discussed in *Fox v Percy* (2003) 214 CLR 118. Referring to the "requirements and limitations of such an appeal" the court said at [23]:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. [Citations omitted.]

See *Toth v DPP (NSW)* [2017] NSWCA 344 at [80]–[83], where no regard for the "natural limitations" of the District Court amounted to jurisdictional error in an appeal against conviction under s 18 *Crimes (Appeal and Review) Act*.

Section 20(2) *Crimes (Appeal and Review) Act* empowers the District Court on a sentence appeal to set aside or vary the sentence or dismiss the appeal. "Sentence" is

exhaustively defined in s 3. "Varying a sentence" is defined in s 3(3) to include: (a) a reference to varying the severity of the sentence, (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature, and (c) a reference to varying or revoking a condition of, or imposing a new condition on, an intensive correction order, community correction order or conditional release order. The power conferred to vary a sentence includes the power to make an order under s 10 of the *Crimes (Sentencing Procedure) Act* 1999 and, for that purpose, to set aside a conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: s 3(3A).

The exercise of a power to set aside or vary a sentence under s 20 operates prospectively: *Roads and Maritime Services v Porret* (2014) 86 NSWLR 467 at [33]. This extends to cases where the variation includes the imposition of a s 10 order and the setting aside the conviction: *Roads and Maritime Services v Porret* at [33]. The exercise of the power to impose a s 10 order does not render the effect of the sentence up to the time of the appeal a nullity: *Roads and Maritime Services v Porret* at [33].

Where the judge is contemplating an increased sentence, the principles in *Parker v DPP* (1992) 28 NSWLR 282 require the judge to indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal: at 295. See further discussion in **Procedural fairness** at **[1-060]**. The court is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. Any sentence varied or imposed and any order made has the same effect and may be enforced in the same manner as if it were made by the Local Court: s 71(3).

[70-125] Appeals to the Supreme Court from the Local Court

A person who has been sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone: s 52 *Crimes (Appeal and Review) Act*. However, such a person may appeal to the Supreme Court on a ground that involves a question of fact, or a question of mixed law and fact, if the court grants him or her leave to do so: s 53.

A person sentenced by the Local Court with respect to an environmental offence may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court: s 53(2).

A question of law alone does not include a mixed question of fact and law: *R v PL* [2009] NSWCCA 256 at [25]. A question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law; while a question concerning the application of incorrect legal principle to the facts of a particular case can give rise to a question of law alone: *Brough v DPP* [2014] NSWSC 1396 at [49]. In that case, an appeal founded upon a critique of the way in which a sentencing magistrate applied well-established principles of totality to the evidence was not a question of law alone: *Brough v DPP* at [50]–[51].

To identify an error by the Local Court in the exercise of its sentencing discretion in terms that amount to an error of the kind identified in *House v King* (1936) 55 CLR 499 at 504, does not of itself answer the question posed by s 56(1), that is, whether the

court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong: *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [46].

If it is apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome: *Bimson* at [48].

A conclusion that the exercise of judicial discretion was unreasonable or plainly unjust may enable the appellate court to infer there was error but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. It will often be a distraction to attempt to label a sentence appealed from as manifestly inadequate or excessive. Instead, the appellant should isolate the question of law or legal principle that the lower court adopted or assumed and then demonstrate that it was wrong and material to the outcome: *Bimson* at [53]. Therefore an assertion that a sentence is manifestly inadequate does not identify a question of law alone as required by s 56(1)(a): *Bimson* at [57]. It is not the court's function under s 56(1)(a) to embark on an inquiry into the adequacy or even manifest inadequacy of a Local Court sentence: *Bimson* at [93].

A ground of appeal alleging that the magistrate had incorrectly characterised the seriousness of the offences did not raise a question of law alone; however a ground alleging that the magistrate had applied an incorrect maximum penalty and jurisdictional limit did raise a question of law alone: *Bimson* at [66], [77].

In determining a severity appeal from the Local Court, the Supreme Court has the power to set aside or vary the sentence, dismiss the appeal, or to set aside the sentence and remit the matter to the Local Court for redetermination: s 55(2).

The Supreme Court does not have jurisdiction to hear an appeal against a sentence imposed in the Local Court if an application for leave to appeal in the District Court has been dismissed and the magistrate's order has been confirmed: *Devitt v Ross* [2018] NSWSC 1675 at [60]–[62].

[70-130] Crown appeals on sentence to the District Court

Section 23 *Crimes (Appeal and Review) Act* 2001 provides that the DPP may appeal to the District Court against a sentence imposed on a person by a Local Court in proceedings for:

(a) any indictable offence that has been dealt with summarily: s 23(1)(a)

(b) any prescribed summary offence (within the meaning of the *Director of Public Prosecutions Act* 1986): s 23(1)(b), or

(c) any summary offence that has been prosecuted by or on behalf of the DPP: s 23(1)(c).

An appeal pursuant to s 23 is of a different nature to a Crown appeal to the Court of Criminal Appeal under the *Criminal Appeal Act*. Section 26 *Crimes (Appeal and Review) Act* provides that a s 23 Crown appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings. The court may

also grant the DPP leave to lead fresh evidence, but only in exceptional circumstances: s 26(2). For the appeal to be upheld, error must be found: *DK v Director of Public Prosecutions* [2021] NSWCA 134 at [32].

The District Court is empowered on an appeal to dismiss the appeal, set aside or vary the sentence: s 27(1); but is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71.

The court has a residual discretion to decline to intervene, on a similar basis to the Court of Criminal Appeal: *DK v Director of Public Prosecutions* at [434]–[445] (see further **[70-100]**–**[70-110]** above). The discretion may not be exercised on the basis of double jeopardy.

[70-135] Crown appeals to the Supreme Court

The Crown may appeal to the Supreme Court against a sentence imposed by a Local Court in any summary proceedings, but only on a ground that involves a question of law alone: s 56(1)(a) *Crimes (Appeal and Review) Act*. Sentences imposed with respect to environmental offences may be appealed by the Crown but only with the leave of the court and on a question of law alone: s 57(1)(a).

See [70-125], above, for discussion of what constitutes a question of law alone. A Crown appeal alleging manifest inadequacy of sentence does not itself raise an error of law: *Morse (Office of the State Revenue) v Chan* [2010] NSWSC 1290 at [5], [39]; *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [51]. The function of the Supreme Court on appeals under s 56(1) is to identify and correct legal error, not to ensure consistency in sentencing for similar offences by magistrates across New South Wales: *Bimson* at [54].

In determining a Crown appeal on a question of law alone, the Supreme Court has the power to set aside or vary the sentence, or to dismiss the appeal: s 59(1). The court is prevented from imposing or varying a sentence to one which could not have been imposed in the Local Court: s 71.

In addition, the court retains a discretion to decline to intervene where an error of law has been established. In *Bimson*, an appeal under s 56, the court declined to intervene although error was established on the basis that the error was caused solely by a statement made to the court by counsel for the prosecution: see [94].

[70-140] Judicial review

Judicial review is another type of appeal available against a District Court judgment following an appeal from the Local Court. There is no right of appeal from the judgment of the District Court given in its criminal jurisdiction, on an appeal to it from the Local Court: *Hollingsworth v Bushby* [2015] NSWCA 251; *Toth v DPP (NSW)* [2014] NSWCA 133 at [6].

Section 69C *Supreme Court Act* 1970 applies to proceedings for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court or sentence imposed by the Local Court. The proceedings are instituted in the supervisory jurisdiction of the Court of Appeal

with respect to a judgment of the District Court: *Tay v DPP (NSW)* [2014] NSWCA 53 at [1]. The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced: at s 69C(2); *Tay v DPP (NSW)* at [5].

Part 59 Uniform Civil Procedure Rules 2005 (NSW), dealing with judicial review proceedings, requires that proceedings must be commenced within three months of the date of the decision sought to be reviewed: r 59.10(1); *Toth v DPP (NSW)* at [6]. Section 176 *District Court Act* 1973 relevantly provides: "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". Section 176 prevents the Court of Appeal exercising its supervisory jurisdiction for error of law on the face of the record: *Hollingsworth v Bushby* at [5], [84], [92]; *Toth v DPP (NSW)* at [6]. The provision does not preclude relief under s 69 *Supreme Court Act* on the ground of jurisdictional error: *Hollingsworth v Bushby* at [5], [84], [92]; *Garde v Dowd* (2011) 80 NSWLR 620.

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